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No. 99-

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IN THE

Supreme Court of the United States

JAMES PAPA,

Petitioner,

v.

KATY INDUSTRIES, INC., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What is the proper test to determine whether affiliated companies constitute a "single employer" for purposes of coverage under the federal antidiscrimination laws?

PARTIES TO THE PROCEEDINGS

The petitioner is James Papa, who was plaintiff-appellant below.

The respondents are KATY Industries, Inc., and Walsh Press Company, Inc., who were defendants-appellees below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, James Papa, respectfully prays that a Writ of Certiorari issue to *reverse* the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on February 8, 1999.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 166 F.3d 937 (7th Cir. 1999) and annexed hereto as Appendix A. This decision affirmed the judgment of the United States District Court for the Northern District of Illinois. The District Court's opinion is not officially reported but is unofficially reported at 1999 WL 142390 (N.D. Ill. Mar. 25, 1998) and annexed hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 8, 1999. Petitioner's motion to the Court of Appeals for the Seventh Circuit for rehearing with suggestion for rehearing *en banc* was denied on March 18, 1999; that decision is annexed hereto as Appendix C. An extension of time within which to file this petition until August 15, 1999, was granted on May 17, 1999.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the meaning of the term "employer" under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*

Section 630(b) of the ADEA states in relevant part:

> "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers."

Section 12111(5)(A) of the ADA states in relevant part:

> "The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year,

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[1] Because August 15, 1999, is a Sunday, the time in which to file this petition was effectively extended to August 16, 1999. Sup. Ct. R. 30(1). The reason for the extension was to unite in this Court the appellate paths of *Papa* and *EEOC v. GJHSRT, Inc.*, No. 96-4093 (C.D. Ill. Mar. 12, 1998), which the Seventh Circuit consolidated on appeal. The EEOC's petition for certiorari is presently due September 11, 1999.

and any agent of such person, except that, for two years following the effective date of this subchapter [July 26, 1992], an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person."

STATEMENT OF THE CASE

James Papa was an employee of Walsh Press Company, Inc. ("Walsh"), from 1983 to 1994. In 1994, Walsh's parent company, KATY Industries, Inc. ("KATY"), ordered Walsh to discontinue one of its production lines. To comply with this directive, Walsh had to lay off some employees. In May 1994, Mr. Papa was informed that his employment would be terminated, and on July 31, 1994, Mr. Papa's employment was in fact terminated. On September 15, 1995, Mr. Papa timely brought suit against Walsh and KATY for discriminatory discharge on the basis of age (under the ADEA) and disability (under the ADA). Walsh and KATY moved for summary judgment on the grounds that Walsh had too few employees to be an "employer" under either the ADEA or the ADA. (Appendix ("App.") B at B-1.) The district court *sua sponte* converted this motion into a motion to dismiss for lack of subject matter jurisdiction and proceeded to resolve factual issues without a hearing under Rule 12(b)(1) of the Federal Rules of Civil Procedure ("F.R.C.P.").

The district court found the following facts: During the relevant time period, Walsh was a wholly owned subsidiary of KATY. In the calendar year 1993, Walsh had 15 or more employees for 20 or more weeks, but did not have 20 or more employees for 20 or more weeks. In 1994, Walsh did not have 15 or more employees for 20 or more weeks. In 1993 and 1994, KATY had more than 25 employees for 20 or more weeks. (App. B at B-3.) Although Walsh did not have the minimum statutory number of employees to be covered by

either the ADEA or the ADA,[2] Mr. Papa maintained that Walsh and KATY constituted a single employer for purposes of determining whether these statutes applied. (App. B at B-8.)

To determine whether Walsh and KATY constituted a "single employer" under the ADEA and ADA, the district court used the four-factor test approved by this Court in *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965), for use in deciding when two nominally distinct entities constitute a "single employer." Under this four-factor test, the district court considered:

1) the interrelation of operations (*i.e.*, common offices, common record keeping, shared bank accounts, shared equipment);

2) common management, common directors and boards;

3) centralized control of labor relations and personnel; and

4) common ownership and financial control.

(App. B at B-10.) Applying these factors, the district court found that Walsh and KATY had some interrelatedness, but not enough to consider them one employer for purposes of the ADEA and ADA. (App. B at B-10, B-11.)[3] Accordingly, the

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[2] The district court rejected Mr. Papa's argument that the relevant discriminatory act was the July 31, 1994, termination, and that Walsh, therefore, was an employer under the ADA's 15-employee minimum applicable to discriminatory acts taken on or after July 26, 1994. *See* 42 U.S.C. § 12111(5)(A). The district court held that the relevant discriminatory act occurred in May 1994, when the termination was communicated to Mr. Papa, and that, therefore, the ADA's pre-July 26, 1994, definition (requiring a minimum of 25 employees) applied. (App. B at B-9.)

[3] Because it followed the Rule 12(b)(1) standard, the district court did not consider the disputed factual issues identified by Mr. Papa in his summary judgment opposition with respect to each of the four factors.

district court found that Walsh alone was Mr. Papa's employer. Because Walsh did not have the minimum statutory number of employees under either the ADEA or ADA, the district court held that it lacked subject matter jurisdiction to hear Mr. Papa's claims. (App. B at B-12.) On March 23, 1998, the district court entered judgment dismissing Mr. Papa's claims.

On April 22, 1998, Mr. Papa timely appealed the district court's decision to the Court of Appeals for the Seventh Circuit asserting that the district court erred in its determination whether the defendants constituted a "single employer" under the ADEA and ADA. Mr. Papa also argued that the district court erred in converting the summary judgment motion to a motion to dismiss for lack of subject matter jurisdiction. Finally, Mr. Papa asserted that, properly considered under F.R.C.P. 56, the defendants' motion for summary judgment should be denied because there are genuine issues of material fact with respect to the relationship between Walsh and KATY.

The Seventh Circuit consolidated Mr. Papa's appeal with an appeal from *EEOC v. GJHSRT, Inc.*,[4] and heard both appeals pursuant to its jurisdiction under 28 U.S.C. § 1291. On February 8, 1999, the Seventh Circuit affirmed the judgment of the district courts in both cases. The Seventh Circuit framed the issue for appeal as "what test to use to determine whether an employer that has fewer than 15 or 20 employees, and thus falls below the threshold for coverage by the major federal antidiscrimination laws, should be deemed covered because it is part of an affiliated group of corporations that has in the aggregate the minimum number of employees." (App. A at A-

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[4] *GJHSRT* presented the same "single employer" issue under Title VII to the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* Title VII defines employer almost identically to the ADEA and ADA and covers only employers with 15 or more employees. *See id.* § 2000e(b). The district court in *GJHSRT* also applied the four-factor test and also found that the defendants did not constitute a "single employer." (App. A at A-3.)

1, A-2 (citations omitted).) The Seventh Circuit recognized that the four-factor test was the test usually invoked to answer this question and that, under this test, there was significant integration between Walsh and KATY, including:

- KATY directed Walsh to terminate part of its business, and consequently, some of its employees;
- KATY determined the salaries of Walsh employees;
- KATY's pension plan applied to Walsh employees;
- KATY funded Walsh;
- KATY and Walsh had integrated computer operations;
- Walsh used KATY's checking account rather than having its own; and
- Walsh needed KATY's approval to write checks above a certain amount.

(App. A at A-2.)

Nevertheless, the Seventh Circuit rejected the four-factor test in favor of its own new formulation. Specifically, the Court limited the "single employer" doctrine to three circumstances: (1) where the traditional conditions for piercing the corporate veil exist, (2) where a small employer was split off from a larger affiliated company or group of companies for the express purpose of avoiding liability under the antidiscrimination laws, or (3) where the parent company is the true violator because it directed the discriminatory act, practice or policy of which its subsidiary's employee complains. (App. A at A-5, A-6, A-7, A-8.) In rejecting the four-factor test, the Seventh Circuit criticized it as vague and contrary to the express statutory exemptions for small employers in the antidiscrimination laws. (App. A at A-4, A-5, A-7, A-8.)

The Seventh Circuit also found that the district court erred in treating the motion as one for lack of subject matter

jurisdiction, but held that the error was harmless and that any improperly resolved factual issues were irrelevant to the determination whether Walsh and KATY were a "single employer" under the ADEA and ADA. (App. A at A-11.) Thus, the Seventh Circuit held that although there was significant integration between Walsh and KATY, Mr. Papa was not entitled to the protection of the federal antidiscrimination statutes.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE SEVENTH CIRCUIT'S TEST IS CONTRARY TO THE BROAD CONSTRUCTION OF THE FEDERAL ANTIDISCRIMINATION STATUTES.

The Seventh Circuit's test unlawfully narrows the coverage of the federal antidiscrimination statutes. As a result, the Seventh Circuit's decision is inconsistent with the broad construction and remedial purpose that Congress intended for these statutes. In addition, the Seventh Circuit's decision is unsupported by the legislative history-based rationale upon which it relies.

A. The Seventh Circuit Test is Inconsistent With the Broad Remedial Purpose of the Federal Antidiscrimination Laws.

The provisions of the federal antidiscrimination statutes—the ADEA, ADA and Title VII[5]—are construed liberally to

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[5] Although Mr. Papa's claims were brought under the ADEA and the ADA, Title VII is also relevant to this inquiry for three reasons. *First*, many of the substantive provisions of the ADEA and ADA were modeled after Title VII. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Vodde v. Indiana Mich. Power Co.*, 852 F. Supp. 676, 678 (N.D. Ind. 1994). Thus, courts have construed these statutes consistently in light of their common language and purpose. *See Evans*, 441 U.S. at 756;

effectuate their broad remedial goals. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (reading Title VII's employee provisions broadly to "maintain[] unfettered access to statutory remedial mechanisms"); *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2157 (1999) (stating that remedial legislation is entitled to liberal interpretation as a matter of statutory construction); *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 & n.3 (5th Cir. 1997); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 425 (8th Cir. 1970); *Armbruster v. Quinn*, 711 F.2d 1332, 1336 (6th Cir. 1983) ("To effectuate its purpose of eradicating the evils of employment discrimination, Title VII should be given a liberal construction.").[6] This broad construction includes the term "employer." *See Lusk*, 129 F.3d at 777; *Trevino v. Celanese Corp.*, 701 F.2d 397, 403 (5th Cir. 1983); *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 391 (8th Cir. 1977); *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973). Indeed, "the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities." *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982) (citations and internal quotation omitted), *vacated and remanded on other grounds*, 463 U.S.

Rothman v. Emory Univ., 123 F.3d 446, 451 (7th Cir. 1997). *Second*, Title VII's definition of "employer" is nearly identical to the definitions in the ADEA and ADA. *See* 42 U.S.C. § 2000e(b); *see also Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993 n.2 (6th Cir. 1997) ("Because Title VII, the ADEA, and the ADA define 'employer' essentially the same way, we rely on case law developed under all three statutes.") (citation and internal quotations omitted). *Third*, the Seventh Circuit's decision applies to Title VII as well as to the ADA and ADEA because of the companion case. *See supra* note 4 and accompanying text.

[6] Congress' intent to construe the antidiscrimination laws broadly is illustrated by the 1991 Amendments to Title VII that expanded the damages available under that statute. *See* 42 U.S.C. §§ 1981, 1981a. These Amendments were expressly passed in response to restrictive court opinions that unduly narrowed the scope of Title VII. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991).

1223 (1983); *see also Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) (rejecting a restrictive reading of the term "employee" for purposes of determining who constitutes an employer under Title VII).

The four-factor test used by the district court is consistent with this broad construction. *See Baker*, 560 F.2d at 392; *Trevino*, 701 F.2d at 403-04. This test, originally formulated by the National Labor Relations Board, was approved by this Court for use in deciding when two nominally distinct entities constitute a "single employer" for labor relations purposes. *Radio & Television Broad. Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (per curiam). Use of this test in the civil rights context makes sense since Title VII was modeled after the National Labor Relations Act ("NLRA"), since the NLRA has a similarly general definition of "employer," and since the four-factor test "seeks to effectuate" similarly "broad and remedial" labor relations goals. *Armbruster*, 711 F.2d at 1336-38; *see also Trevino*, 701 F.2d at 403 & n.9. Indeed, this Court has stated that it considers the NLRA, Title VII, the ADEA and the ADA as part of the same broad "statutory scheme to protect employees in the workplace nationwide." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). Moreover, the four-factor test is uniquely appropriate since it balances the presumption of corporate separateness with the policy aim of imposing antidiscrimination liability when that separateness is abated. "The rationale for the [single employer] exception is the fairness of imposing responsibility on an entity that shares decisionmaking authority with the employing entity." *Murray v. Miner*, 74 F.3d 402, 405 (2d Cir. 1996). Thus, the four-factor test embodies the necessary flexibility to advance the remedial goals of Congress' broad antidiscrimination legislation.

By contrast, the narrow Seventh Circuit test undermines this broad remedial purpose. A straightforward "piercing the corporate veil" test, such as the first condition adopted by the

Seventh Circuit, is "too stringent" because it fails to consider the public policy considerations behind broad antidiscrimination laws. *Lusk*, 129 F.3d at 777 & n.3. Moreover, the Seventh Circuit test erroneously treats civil rights violations the same as any contract case. (App. A at A-7.) This approach ignores the fact that a veil-piercing test is influenced by whether the underlying suit is a contract action or a civil wrong. *See Birbara v. Locke*, 99 F.3d 1233, 1238 (1st Cir. 1996) ("Several courts and commentators have suggested that it should be more difficult to pierce the veil in a contract case than in a tort case."). Additionally, the Seventh Circuit's veil-piercing test is undesirable because it subjects federal antidiscrimination statutes to state law veil-piercing tests that may vary widely; as a result, similarly-situated plaintiffs and employers may face different standards in each state. The second and third conditions of the Seventh Circuit's test are similarly narrow, requiring actual evidence of direct involvement of the parent company. *See Stanford v. Brambles USA, Inc.*, No. 98 C 1021, 1999 WL 495466, at *7 (N.D. Ill. June 30, 1999). Thus, the Seventh Circuit's test improperly restricts the reach of the federal antidiscrimination statutes and runs afoul of Congress' remedial goals.

B. The Seventh Circuit Test is Unsupported By the Legislative History and the Purpose of the Statutory Exemptions for Small Employers.

The Seventh Circuit justifies its new test by selectively interpreting the legislative history behind the exemption for small employers. In fact, however, the Seventh Circuit's test is unsupported by the legislative history and the four-factor test already answers the Seventh Circuit's concerns.

The Seventh Circuit states that the sole purpose of the small employer exemption "is to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at

compliance fail." (App. A at A-5.) Although Congress considered that concern, it was not the only—or even primary—justification for the minimum employee provision. In fact, there were at least three other reasons for limiting the definition of "employer": (1) to allow small family businesses to continue their intimate hiring and employment practices, (2) to protect the economy and competition, and (3) to justify the constitutionality of federal employment legislation under the Commerce Clause. *See Morelli v. Cedel*, 141 F.3d 39, 45 (2d Cir. 1998); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995); *id.* at 1322 (Parker, J., dissenting). By ignoring these other reasons, the Seventh Circuit mischaracterizes the legislative history and the purpose of the small employer exemption.

The Seventh Circuit also overlooks the safeguards already built into the antidiscrimination statutes and the four-factor test to protect small employers from undue burden. *First*, the antidiscrimination statutes contain internal mechanisms to assist and protect small employers subject to these laws. The ADA, for example, contains an "undue hardship" provision that measures an employer's obligations in relation to its available resources. *See* 42 U.S.C. § 12111(10)(B) (considering, among other things, the "overall financial resources of the covered entity," "the overall size of the business" and "the number of its employees"); *see also* H.R. Rep. No. 101-485(II), at 67 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 349-50 (stating that the undue hardship provision "turns on the nature and cost of the accommodation in relation to the employer's resources and operations"). By limiting the circumstances in which small employers can be held liable, the statutes shield small employers from overwhelming liability.

Second, the four-factor test contains checks to ensure that small employers are subject to liability only when they are "highly integrated with respect to ownership and operations" with a larger company. *Armbruster*, 711 F.2d at 1338; *Swallows*, 128 F.3d at 995 (requiring the parent company to

exercise actual control over the subsidiary). For example, the test expressly looks for common operations and finances, the presence of which suggests assistance from the parent company in absorbing the cost of compliance and liability. Coverage would not subject Walsh to "crushing expense," for instance, since KATY funds Walsh and would share in any compliance or liability costs. Small employers without such integration with a larger entity, however, are still exempt. Thus, small employers remain shielded from liability under the four-factor test if they would truly face coverage or liability alone.[7]

In sum, the Seventh Circuit erred by rejecting the four-factor test that is uniquely crafted to carry out the broad purpose of the antidiscrimination laws. The Court should grant certiorari to correct this error and restore the federal antidiscrimination laws to their full implementation.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG THE CIRCUITS AS TO THE PROPER TEST TO DETERMINE WHETHER AFFILIATED COMPANIES CONSTITUTE A "SINGLE EMPLOYER" UNDER THE ANTIDISCRIMINATION LAWS.

To date, at least five circuits—the Second, Fifth, Sixth, Eighth and Ninth—have expressly and repeatedly adopted the four-factor test to determine whether affiliated companies constitute a single employer for purposes of the ADEA, ADA

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[7] Moreover, although it might seem unlikely that large employers would subdivide into smaller divisions to avoid the antidiscrimination laws, it is plausible that they would subdivide to avoid the damage caps created in the 1991 Amendments to Title VII, 42 U.S.C. § 1981 *et seq.* By subdividing into smaller divisions of 15, an employer can lower its potential compensatory and punitive damages liability under Title VII from $500,000 to only $50,000. *See* 42 U.S.C. § 1981a(b)(3). This incentive to subdivide makes the existence of smaller employers more likely, and increases the importance of applying the proper test. Indeed, as the Seventh Circuit recognized, "the cumulative effect of discrimination by many small firms could be substantial." (App. A at A-5.)

and Title VII. *See Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1241 (2d Cir. 1995) ("We believe that the appropriate test under Title VII for determining when parent companies may be considered employers of a subsidiary's employees is the four-part test adopted by the Fifth, Sixth, and Eighth circuits."); *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 764 (5th Cir. 1997) (reaffirming its adoption of the four-factor test in *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. 1983)); *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993-94 (6th Cir. 1997) (citing *Armbruster v. Quinn*, 711 F.2d 1332, 1337-38 (6th Cir. 1983) and *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982)); *Artis v. Francis Howell N. Band Booster Ass'n*, 161 F.3d 1178, 1184 (8th Cir. 1998) (reaffirming its adoption of the four-factor test in *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 392 (8th Cir. 1977)); *Herman v. United Bhd. of Carpenters and Joiners of Am. Local Union No. 971*, 60 F.3d 1375, 1383 (9th Cir. 1995) (citing adoption of the four-factor test in *Childs v. Local 18, Int'l Bhd. of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983)). Four other circuits—the First, Tenth, Eleventh, and District of Columbia—have applied the four-factor test without expressly adopting it. *See Mas Marques v. Digital Equip. Corp.*, 637 F.2d 24, 27 (1st Cir. 1980); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1070-71 (10th Cir. 1998) (recognizing its use of the test in numerous cases and stating that "[t]he trend in Title VII cases appears to be in favor of adopting [the four-factor] test"); *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987) (applying the four-factor test and calling it the "predominant trend" in determining whether two businesses should be treated as one under Title VII); *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 625-26 (D.C. Cir. 1997).

Courts that have not adopted the four-factor test tend to rely simultaneously on a number of tests, including the four-factor test. For instance, the Tenth Circuit has identified as many as four tests and refused to adopt any as exclusive. *See*

Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993). Courts in the First Circuit follow a variety of approaches without differentiating because the First Circuit "apparently consider[s] all of them to be useful." *Odriozola v. Superior Cosmetic Distribs., Inc.*, 531 F. Supp. 1070, 1075-76 & n.4 (D.P.R. 1982). Similarly, the Fourth Circuit looks at the parent's degree of control over its subsidiary and considers the factors of the four-factor test without "adopt[ing] such a mechanical test in every instance." *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 981 & n.* (4th Cir. 1987). None of these circuits, however, has rejected the four-factor test.

The Seventh Circuit's wholesale rejection of the four-factor test has effectively created a three-way circuit split with respect to the "single employer" doctrine: those that expressly follow the four-factor test, those that use the four-factor test as one of several inquiries, and one that rejects the four-factor test altogether. As a result, victims of discrimination are subjected to different treatment based solely on the fortuity of where they bring suit. Similarly, those who discriminate are treated differently depending on where they happen to be. In fact, where an employer has divisions in different states, that same employer may be subject to different standards where those states fall into different circuits.[8] This disparate treatment will inevitably result in unequal access to the courts, forum shopping, and confusion among the lower courts.[9] The Court

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[8] For example, an employer with divisions in Indiana and Ohio would face the four-factor test in its Ohio division (the Sixth Circuit) but the more restrictive veil-piercing test in Indiana (the Seventh Circuit).

[9] This confusion already exists. District courts in the First Circuit, for example, do not agree on whether to abide by the four-factor test. *Compare Odriozola*, 531 F. Supp. at 1075-76 & n.4 (stating that the First Circuit has not adopted any one approach and applying a variety of tests) *with Moreno v. John Crane, Inc.*, 963 F. Supp. 72, 75 (D.P.R. 1997) (stating that the First Circuit has adopted the four-factor test). Similarly, although the Third Circuit has stated that it has given no guidance as to which test to follow, *Marzano v. Computer Science Corp.*, 91 F.3d 497, 513 (3d Cir. 1996),

should grant certiorari to resolve this circuit split and ensure similar justice for all victims of discrimination.

III. THE COURT SHOULD GRANT CERTIORARI TO ENSURE THAT VICTIMS OF DISCRIMINATION ENJOY FAIR ACCESS TO THE COURTS AND A PROPER REVIEW OF THEIR CLAIMS.

As a legal matter, this case involves the important issue of when an employer should be subject to antidiscrimination liability. As a practical matter, however, this case is about an individual's access to the courts. If the Seventh Circuit test goes unchecked, countless victims of discrimination (like Mr. Papa) will be denied the right to have their claims considered under the proper, more flexible four-factor test. Ultimately, this will result in fewer valid discrimination claims being remedied. Indeed, in just six months since the Seventh Circuit's decision, at least three more plaintiffs have had discrimination claims dismissed under the restrictive and erroneous Seventh Circuit test. *See Ritter,* 1999 WL 569566, at *3-*4; *Foster Wheeler Constrs.*, 1999 WL 507397, at *6-*7; *Stanford*, 1999 WL 495466, at *7. The Court should grant certiorari to correct the Seventh's Circuit error and to ensure that plaintiffs are not deprived of the opportunity to have their discrimination claims fairly evaluated. Without such review,

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district courts in that circuit have varied between adopting the four-factor test, *see Brown v. Vitelcom, Inc.*, 47 F. Supp.2d 595, 600 (D.V.I. 1999) (calling the four-factor test the "weight of authority"); *Ellis v. Mohenis Servs., Inc.*, No. Civ. A. 96-6307, 1997 WL 364468, at *6 (E.D. Pa. June 18, 1997), and applying a variety of tests that are of "little substantive difference," *see Berkowitz v. Allied Stores of Penn-Ohio, Inc.*, 541 F. Supp. 1209, 1215 (E.D. Pa. 1982). This confusion is exacerbated by the fact that district courts in the Seventh Circuit now ignore the four-factor test and apply a different standard altogether. *See Ritter v. Hill 'N Dale Farm, Inc.*, No. 98 C 2895, 1999 WL 569566, at *3 (N.D. Ill. July 28, 1999); *United States Equal Employment Comm'n v. Foster Wheeler Constrs., Inc.*, No. 98 C 1601, 1999 WL 507397, at *6-*7 (N.D. Ill. July 6, 1999); *Stanford,* 1999 WL 495466, at *7.

proper enforcement of the federal antidiscrimination statutes cannot be accomplished.

IV. THE COURT SHOULD GRANT CERTIORARI TO PREVENT THE SEVENTH CIRCUIT'S ERROR FROM CURTAILING ENFORCEMENT OF OTHER FEDERAL LABOR STATUTES.

The Seventh Circuit's decision not only threatens to impact enforcement of antidiscrimination laws, but also risks curtailing enforcement of other federal labor statutes. Already, the Seventh Circuit's decision has been interpreted by lower courts as eradicating the four-factor test for other federal statutes, such as the Family and Medical Leave Act ("FMLA"). In *Diangi v. Valex, Inc.*, No. 98 C 2534, 1999 WL 498613 (N.D. Ill. July 7, 1999), the court extended *Papa* to the FMLA stating: "We recognize that *Papa* directly concerned only antidiscrimination statutes, but its sweep is far broader." *Id.* at *1.[10] Reading *Papa* with this "broad sweep" exacerbates the Seventh Circuit's error by curtailing enforcement of other federal labor statutes. The Court should grant certiorari to prevent further enlargement of the Seventh Circuit's error.

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[10] This extension of the Seventh Circuit's narrow test is especially troubling in light of the fact that the FMLA defines the term "employer" more expansively than Title VII or the ADA. *See Wascura v. Carver*, 169 F.3d 683, 685 (11th Cir. 1999).

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted to review the decision of the Seventh Circuit Court of Appeals.

August 16, 1999.

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APPENDIX A

James PAPA, Plaintiff-Appellant,

v.

KATY INDUSTRIES, INC. and Walsh Press Company, Inc., Defendants-Appellees.

Equal Employment Opportunity Commission, Plaintiff-Appellant,

v.

GJHSRT, Inc., et al., Defendants-Appellees.

Nos. 98-2009, 98-2185.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 4, 1998.

Decided Feb. 8, 1999.

Rehearing and Suggestion for Rehearing En Banc
Denied March 18, 1999.

Before POSNER, Chief Judge, and BAUER and EVANS, Circuit Judges.

POSNER, Chief Judge.

We have consolidated for decision two appeals that raise the same issue. That issue is what test to use to determine whether an employer that has fewer than 15 or 20 employees, and thus falls below the threshold for coverage by the major

federal antidiscrimination laws, 42 U.S.C. § 2000e(b) (Title VII of Civil Rights Act of 1964) (15 employees); 42 U.S.C. § 12111(5)(A) (Americans with Disabilities Act) (15 after 1994); 29 U.S.C. § 630(b) (Age Discrimination in Employment Act) (20), should be deemed covered because it is part of an affiliated group of corporations that has in the aggregate the minimum number of employees. The parties treat the issue, as have previous cases to address it, as one of federal common law.

In the first case that we review today, James Papa brought suit under the age-discrimination and disabilities laws against Katy Industries, Inc. and its wholly owned subsidiary Walsh Press Company, Inc. Papa was employed by Walsh, which had too few employees to be covered by the laws under which Papa is suing. Katy, however, the parent, has numerous subsidiaries, employing in the aggregate more than a thousand employees. Katy ordered Walsh's president to discontinue one of its production lines. To comply with this directive, the president had to lay off some of Walsh's employees. One of the ones he laid off was Papa. The question is whether Papa's "real" employer was Katy, or (it makes no difference in this case) the entire consolidated group, rather than Walsh.

Walsh complies with all the formalities required of a subsidiary that wants to have a corporate identity different from that of its parent. Yet there is—unsurprisingly, considering how small Walsh is—a degree of integration between it and Katy. It is illustrated by the latter's command to Walsh to abandon a part of Walsh's business, requiring layoffs. And there is more. The salaries of Walsh's employees are fixed by Katy, and the employees participate in Katy's pension plan; Katy funds Walsh; their computer operations are integrated; Walsh had the use of certain subaccounts in Katy's checking account rather than having its own bank account; and Walsh needs Katy's approval to write checks of more than $5,000. The district court held, nevertheless, that Katy was not Papa's

employer and hence that the court lacked jurisdiction over Papa's suit.

The facts in the second case are quite similar. The plaintiff—the EEOC suing on behalf of Richard Mueser, a former regional manager of defendant GJHSRT—charged that the company had violated the antiretaliation provision of Title VII by firing Mueser. GJHSRT didn't have 15 employees but is a part of an affiliated group known as the "Frederick Group of Companies," which like Katy has many more employees than is necessary to trigger the coverage of the antidiscrimination laws. Each of the Frederick companies is engaged in a different phase of the trucking business and at a different location, but as with Katy there is a degree of integration. Payroll and benefits are centralized, as are computer operations; the membership of the boards of directors of the two companies overlaps; and employees are moved back and forth among affiliates. The district court, nevertheless, granted summary judgment for the defendants, holding that only GJHSRT was Mueser's employer.

The briefs in these two cases examine four factors, treating none as entitled to more weight than any of the others, to determine whether the nominal employer is part of an "integrated enterprise" and in consequence not allowed to invoke the few-employees exemption. These factors are interrelation of operations, common management, common ownership, and centralized control of labor relations and personnel. We cannot blame the lawyers for structuring their analysis this way, because we and other courts of appeals have often done likewise, *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 678 (7th Cir. 1998); *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 582 (7th Cir. 1994); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1069-70 (10th Cir. 1998); *Artis v. Francis Howell North Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1184 (8th Cir. 1998); *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993-94 (6th Cir. 1997); *Cook v. Arrowsmith*

Shelburne, Inc., 69 F.3d 1235, 1240-41 (2d Cir. 1995); *Herman v. United Brotherhood of Carpenters & Joiners*, 60 F.3d 1375, 1383 (9th Cir. 1995)—though not always. In *EEOC v. Illinois*, 69 F.3d 167, 171-72 (7th Cir. 1995); *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997); *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 765 (5th Cir. 1997), and *Johnson v. Flowers Industries, Inc.*, 814 F.2d 978, 981 n. * (4th Cir. 1987), although the four-factor test is cited or recited, the focus of the opinions is on whether the parent corporation made the personnel decision—committed the discriminatory act—of which the plaintiff was complaining. There is no necessary incompatibility between the two lines of case. The opinion in Lusk explains that the four factors "are examined only as they bear on this precise issue," 129 F.3d at 777, that is, the issue of whether the parent was the real decision maker. In a number of other cases, such as our Sharpe decision, the four-factor test is applied because the parties agreed that it is the right test, but is not endorsed by the court.

There is enough uncertainty about the standard to warrant a fresh look. This is especially appropriate because of the vagueness of three of the four factors (all but "common ownership" and it, as we shall see, is useless); because, being unweighted, the four factors do not yield a decision when, as in the two cases before us, they point in opposite directions; and because the test was not custom-designed for answering exemption questions under the antidiscrimination laws, but instead was copied verbatim from the test used by the National Labor Relations Board to resolve issues of affiliate liability under the laws administered by the Board. *Rogers v. Sugar Tree Products, Inc.*, *supra*, 7 F.3d at 582; *Armbruster v. Quinn*, 711 F.2d 1332, 1336-38 (6th Cir. 1983); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. 1977).

The place to start in rethinking the proper standard is with the purpose, so far as it can be discerned, of exempting tiny employers from the antidiscrimination laws. The purpose is

not to encourage or condone discrimination; and Congress must realize that the cumulative effect of discrimination by many small firms could be substantial. The purpose is to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail. See *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) (reviewing legislative history); *Miller v. Maxwell's International Inc.*, 991 F.2d 583, 587 (9th Cir. 1993). This purpose or policy is unaffected by whether the tiny firm is owned by a rich person or a poor one, or by individuals or another corporation. If a firm is too small to be able economically to cope with the antidiscrimination laws, the owner will not keep it afloat merely because he is rich; rich people aren't famous for wanting to throw good money after bad. So an approach actually hinted at in the EEOC's brief of treating *any* affiliated group of corporations as a single employer of all the employees of all the corporations in the group would lead as rapidly to the destruction of tiny firms as the approach obviously rejected by Congress of applying the antidiscrimination laws to every employer, no matter how few employees he has.

There are three situations in which the policy behind the exemption of the tiny employer is vitiated by the presence of an affiliated corporation; the exemption should be construed to exclude them. The first situation is where, the traditional conditions being present for "piercing the veil" to allow a creditor, voluntary or involuntary, of one corporation to sue a parent or other affiliate, e.g., *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 1885, 141 L.Ed.2d 43 (1998); *Anderson v. Abbott*, 321 U.S. 349, 362-63, 64 S.Ct. 531, 88 L.Ed. 793 (1944); *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 413-16 (7th Cir. 1988); *In re Kaiser*, 791 F.2d 73, 75-77 (7th Cir. 1986); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458- 61 (2d Cir. 1995), the parent or affiliates of the plaintiff's employer would be liable for the

employer's debts. If because of neglect of corporate formalities, or a holding out of the parent as the real party with whom a creditor nominally of a subsidiary is dealing, a parent (or other affiliate) would be liable for the torts or breaches of contract of its subsidiary, it ought equally to be liable for the statutory torts created by federal antidiscrimination law. In such a case the parent by its actions has forfeited its limited liability. This approach is conventional in discrimination cases where the employee of a subsidiary seeks to affix liability on the parent for reasons unrelated to the subsidiary's being within the exemption for employers who have only a few employees. *Harrington v. Aetna-Bearing Co.*, 921 F.2d 717, 718 (7th Cir. 1991); *Marzano v. Computer Science Corp.*, 91 F.3d 497, 513-14 (3d Cir. 1996); *Johnson v. Flowers Industries, Inc.*, *supra*; *Watson v. Gulf & Western Industries*, 650 F.2d 990, 993 (9th Cir. 1981).

Second, an enterprise might split itself up into a number of corporations, each with fewer than the statutory minimum number of employees, for the express purpose of avoiding liability under the discrimination laws. The division might be accomplished in such a way as to avoid creating the conditions in which the corporate veil is normally pierced. Each subsidiary might be adequately funded and comply with all requisite formalities for separate corporate status, and the group might make clear to all employees and all creditors that they could look only to the particular corporation with which they had dealt for the enforcement of their contractual entitlements. But if the purpose of this splintered incorporation were to elude liability under the antidiscrimination laws, the corporations should be aggregated to determine how many employees each corporation had. The privilege of separate incorporation is not intended to allow enterprises to duck their statutory duties. See *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 85 F.3d 1282, 1288 (7th Cir. 1996); *Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449, 461 (7th Cir. 1991); *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 38

F.3d 1467, 1474, 1477 (9th Cir. 1994); cf. *Yosha v. Commissioner*, 861 F.2d 494 (7th Cir. 1988) (substance over form doctrine in tax law).

Third, the parent corporation might have directed the discriminatory act, practice, or policy of which the employee of its subsidiary was complaining. In that event, the parent, provided that the sum of its employees and those of the subsidiary employing the plaintiff exceeded the statutory minimum, would be the violator. This is the holding of *EEOC v. Illinois*; *Lusk v. Foxmeyer Health Corp.*, and *Schweitzer v. Advanced Telemarketing Corp.*, all cited earlier; see also *Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847, 853-54 (2d Cir. 1985); and for the general principle—that limited liability does not protect a parent corporation when the parent is sought to be held liable for its own act, rather than merely as the owner of the subsidiary that acted—see *United States v. Bestfoods*, *supra*, 118 S.Ct. at 1886; *Spartech Corp. v. Opper*, 890 F.2d 949, 953 (7th Cir. 1989); *Esmark, Inc. v. NLRB*, 887 F.2d 739, 756-57 (7th Cir. 1989); *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.*, 31 F.2d 265, 267 (2d Cir. 1929) (L.Hand, J.). *Bestfoods*, which we have now cited twice, was not a discrimination case; nor *Spartech* or any of the other cases we have just cited. But we cannot think of a good reason why the legal principles governing affiliate liability should vary from statute to statute, unless the statute, or the particular policy that animates the statute, ordains a particular test. (The exception is applicable to the National Labor Relations Act, as we shall see.) The basic principle of affiliate liability is that an affiliate forfeits its limited liability only if it *acts* to forfeit it—as by failing to comply with statutory conditions of corporate status, or misleading creditors of its affiliate, or configuring the corporate group to defeat statutory jurisdiction, or commanding the affiliate to violate the right of one of the affiliate's employees. The act requirement is emphasized in our decision in *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, *supra*, 855 F.2d at 413-16, and in numerous other cases across

the full range of American law. See, e.g., *In re Kaiser*, *supra*, 791 F.2d at 75, 77; *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 160 (7th Cir. 1963); *Lowendahl v. Baltimore & Ohio R.R.*, 247 A.D. 144, 287 N.Y.S. 62, 76 (App. Div. 1936); cf. Phillip I. Blumberg, *The Law of Corporate Groups: Substantive Law* § 6.02, p. 114 (1987).

The claim that a group of affiliated corporations is "integrated," the sort of claim that the four-factor test might be thought to support, not only is vague, but is unrelated to the act requirement just explained or to the policy behind the exemption for employers that have very few employees. Firms too tiny to achieve the realizable economies of scale or scope in their industry will go under unless they can integrate some of their operations with those of other companies, whether by contract or by ownership. The choice between the two modes of integration is unrelated to the exemption. Take contractual integration first. A firm too small to have its own pension plan will join in a multiemployer pension plan or will in effect pool with other employers by buying an insurance policy. David L. Gregory, "Mandatory Arbitration and Wealth Distribution: The Policies and Politics of the Multiemployer Pension Plan Amendments Act," 24 *U.C. Davis L.Rev.* 195, 197 (1990); Alicia H. Munnell, *The Economics of Private Pensions* 219 (1982). It will consult an outside law firm, representing many business firms, rather than having a staff of in-house lawyers. It will hire an accounting firm to do its payroll rather than having its own payroll department. It may ask the Small Business Administration for advice on how to maximize its profits by pruning its least profitable operations. None of these forms of contractual integration would subject tiny employers to the antidiscrimination laws, because the integration is not of affiliated firms. Why should it make a difference if the integration takes the form instead of common ownership, so that the tiny employer gets his pension plan, his legal and financial advice, and his payroll function from his parent

corporation without contractual formalities, rather than from independent contractors?

That is all that's involved in the cases before us. There is no suggestion in either one that the business enterprise was splintered into separate corporations in order to defeat the antidiscrimination laws; Walsh, for example, was acquired, not created, by Katy. There is no showing that an ordinary creditor of one of the subsidiaries could pierce the corporate veil and sue the parent corporation or any of the other subsidiaries. There is no suggestion that the parent, or any other affiliate of Walsh's, or the enterprise as a whole formulated or administered the specific personnel policies, or directed, commanded, or undertook the specific personnel actions, of which the plaintiffs are complaining. It is true that Katy in a sense "caused" the firing of Papa by ordering Walsh to curtail its operations; for, had Walsh not curtailed them, Papa would probably not have been laid off, or so soon. But Papa cannot complain of being laid off as such; the antidiscrimination laws do not forbid layoffs. He can complain only if he was selected for layoff on some forbidden ground. Maybe he was, but there is no suggestion that Katy (or any of Katy's other subsidiaries) was responsible for his being selected for layoff, let alone for Walsh's having picked on him for a forbidden reason.

Where a focus on integration makes sense is in the original context of the four-factor test: the determination by the National Labor Relations Board of whether it has jurisdiction over an employer or, even more clearly, what the appropriate bargaining unit is. See, e.g., *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965) (per curiam); *South Prairie Construction Co. v. Local No. 627*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976) (per curiam). If the work forces of two affiliated corporations are integrated, there is an argument for a single bargaining unit covering both of them, and also an argument that they should be combined for

purposes of determining whether the effect on commerce is substantial enough to justify the Board in asserting jurisdiction. But there is no argument for making one affiliate liable for the other's independent decision to discriminate. Courts that have borrowed the four-factor test for use in the discrimination context have, perhaps, been insufficiently sensitive to the bearing of context on the proper formulation of rules of affiliate liability.

Both plaintiffs argue, though only in general terms, that the conditions for piercing the veil are present in these cases, implying that an ordinary creditor could go against the parent corporation (or another sub). The argument is unconvincing. The plaintiffs seem to think that unless a corporate group erects a Chinese wall between affiliates, each affiliate is responsible for the other's debts. That is nonsense. It is true that one corporation will sometimes own another corporation purely as an investment, with no desire to achieve economies of scale or scope by integrating various functions, such as borrowing, legal advice, back-office operations, personnel policies, and higher management. But that is not the usual case, and is certainly not a condition of limited liability. The corporate veil is pierced, when it is pierced, not because the corporate group is integrated, Blumberg, *supra*, § 20.05, but (in the most common case) because it has neglected forms intended to protect creditors from being confused about whom they can look to for the payment of their claims. *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, *supra*, 855 F.2d at 415-16; *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994); *In re Kaiser*, *supra*, 791 F.2d at 75.

So we think the decisions of the district courts in this pair of cases are right and should be affirmed, but there is one loose end. Although the defendants in Papa's case had tendered their argument for the few-employees exemption in a motion for summary judgment, the district judge, thinking the issue jurisdictional, converted it to a Rule 12(b)(1) motion (motion

to dismiss for want of subject-matter jurisdiction) and proceeded to find facts rather than merely to decide whether there was a genuine issue of material fact, which is the determination called for by a motion for summary judgment. The judge was wrong; the issue is not jurisdictional. *Sharpe v. Jefferson Distributing Co.*, *supra*, 148 F.3d at 678, and cases cited there. But the error was harmless. The factual issues about which the parties disagreed, and which may or may not have been improperly resolved by the informal method adopted by the judge, are irrelevant to the view that we take of the proper way to approach the determination of whether an employer who has fewer than the statutory minimum number of employees is, nevertheless, covered by the antidiscrimination laws because of his connections to another employer.

AFFIRMED.

APPENDIX B

James PAPA, Plaintiff,

v.

KATY INDUSTRIES, INC. and WALSH PRESS COMPANY., INC., jointly, severally, and in the alternative, Defendants.

No. 95 C 5290.

United States District Court, N.D. Illinois.

March 25, 1998.

MEMORANDUM OPINION AND ORDER

NORDBERG, District J.

Plaintiff has sued Defendants alleging he was terminated in violation of the Age Discrimination in Employment Act ("A.D.E.A."), 29 U.S.C. § 621, *et seq.*, and the Americans with Disabilities Act ("A.D.A."), 42 U.S.C. § 12101, *et seq.* Before the Court is Defendants' motion for summary judgment.

Defendants seek summary judgment on the grounds that the Court lacks subject matter jurisdiction over this action. Specifically, Defendants argue Plaintiff's employer, Walsh, had too few employees during the relevant period to be an "employer" under either the A.D.E.A. or A.D.A.

I. Legal Standard

Although Defendant's motion is styled as a motion for summary judgment, the Court will consider it as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1).

In general, summary judgment is inappropriate where the claimed grounds for summary judgment are jurisdictional. *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir.1993); Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d § 2713*. As the *Capitol Leasing* court notes, asking the Court to enter judgment on the grounds that the Court lacks jurisdiction "verges on non sequitur." *Id.* Plainly, if the Court does not have jurisdiction, it lacks the authority to enter judgment of any sort. Furthermore, courts specifically addressing Defendant's "employer" argument have done so in the context of a motion to dismiss. *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 579 (7th Cir.1993); *Line v. Fey, Inc.*, 1997 WL 538715, *1 (N.D. Ill. August 27, 1997). Accordingly, the Court will treat Defendant's motion as a motion to dismiss.

In a motion to dismiss for lack of subject matter jurisdiction, where the relevant facts are contested the party asserting jurisdiction bears the burden of establishing the required jurisdictional facts "by competent proof." *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir.1979); *Line*, 1997 WL 538715, *1; *see also*, *Rogers*, 7 F.3d at 577. Thus, Plaintiff cannot avoid dismissal merely by establishing a genuine issue of material fact. *Line*, 1997 538715, *1; *Lumpkin v. United States*, 791 F. Supp.. 747, 749 (N.D.Ill.1992). Instead, Plaintiff must prove by "a preponderance of the evidence or 'proof to a reasonable probability' that jurisdiction exists." *NLFC, Inc. v. Devocom MidAmerica, Inc.*, 45 F.3d 231, 237 (7th Cir.) (quoting *Gould v. Artisoft, Inc.*, 1 F.3d 544, 547 (7th Cir.1993)).

I. Findings of Fact

Based on the record before the Court, the Court finds the following facts.

A. Plaintiff's Employment with Walsh

Defendant Walsh Press Company, Inc ("Walsh") hired Plaintiff James Papa on May 2, 1983. In a meeting near the end of May 1994, Walsh's president, Jerome W. Heyda, informed Papa and other Walsh employees that they would be discharged on June 30, 1994 or July 31, 1994 as part of a reduction-in-force. Papa, in fact, was discharged on July 31, 1994.

In 1993, the calendar year prior to Plaintiff's discharge, Walsh employed fifteen or more employees for twenty or more weeks, but did not employ twenty or more employees for twenty or more weeks. In 1994, Walsh did not employ fifteen or more employees for twenty or more calendar weeks. In both 1993 and 1994, KATY employed more than twenty-five employees for twenty or more calendar weeks.

B. Relationship Between Walsh and KATY

When Walsh hired Plaintiff, Walsh was an independent company. However, in October 1987 Defendant KATY Industries, Inc. ("KATY"), through its subsidiary American Gage & Machine ("AG & M"), acquired Walsh. Until April 1996, Walsh was a wholly-owned operating subsidiary of KATY. In April 1996, nearly two years after Plaintiff's discharge, Walsh sold its assets and became a non-operating subsidiary of KATY. KATY has various operating and non-operating subsidiaries, which KATY organizes into three principal operating groups: Industrial Machinery, Industrial Components, and Consumer Products. Walsh is part of KATY's Industrial Machinery Group.

Despite their parent-subsidiary relationship, Walsh and KATY maintained separate operations. The companies had separate offices and equipment and shared neither warehouse nor manufacturing facilities. In fact, during Papa's tenure with Walsh, Walsh's facilities were in Forest Park, Illinois while KATY's were in Elgin, Illinois and, subsequently, in

Englewood, Colorado. KATY and Walsh also maintained separate corporate and financial records. Walsh's financial records were maintained by Walsh Vice President Walter Lane and other Walsh personnel.

For the most part, Walsh and KATY had separate and distinct management. Heyda and Lane were primarily responsible for day-to-day management of Walsh; both are Walsh employees and neither was directly employed by KATY. Heyda, who hired Plaintiff in 1983 and was Walsh's president at all times relevant to this action, was specifically responsible for Walsh's employment and labor relations decisions. Heyda testifies that he did not require KATY's approval regarding those decisions. Heyda has never been employed by KATY directly. (He was, however, an officer for another KATY subsidiary.) While certain KATY employees were involved in overseeing Walsh, none were actively involved in Walsh's day- to-day management. In 1993 and 1994, two individuals were officers of both Walsh and KATY. J. Russell Jones was Walsh's treasurer and Paul Kurowski was Walsh's secretary. However, Jones and Kurowski were not involved in Walsh's day-to-day operations or Walsh's employment and labor relations decisions. In 1993 and 1994, no individual was a director of both Walsh and KATY. (As Plaintiff points out, Walsh and KATY shared additional officers and directors after Plaintiff was terminated; however, the relationship between Walsh and KATY in years following Plaintiff's termination is not relevant to this action.)

To be sure, the separation between Walsh and Katy was not absolute. First of all, KATY had substantial financial control over Walsh. KATY maintained a central "cash concentration" account from which its subsidiaries, including Walsh, were allowed to draw. KATY established limits on the amounts that a subsidiary could transfer from the account at a given time, but Heyda testifies that these limits were readily skirted by writing multiple checks for a given transaction rather

than a single check. KATY monitored its subsidiaries' use of the account by maintaining a subaccount for each subsidiary. As Walsh was unprofitable during its entire operating history under KATY, Walsh consistently had a negative subaccount balance. Thus, KATY regularly provided Walsh with funds necessary for Walsh to continue operating. Ultimately, Walsh's balance was "zeroed out" some time following Plaintiff's discharge. In essence, Walsh never repaid the "loans" from KATY. Therefore, the Court finds that KATY had substantial financial control over Walsh, but that Walsh did retain day-to-day control in that it could access funds, up to a limit, without KATY's prior approval.

Second, KATY performed certain administrative functions for its subsidiaries, including Walsh. For instance, KATY served as administrator of a "consolidated" 401K pension plan for KATY and its "participating" subsidiaries. Walsh was a participating subsidiary in this plan. Similarly, KATY maintained insurance policies for its subsidiaries.

Third, KATY required Walsh to prepare an annual operating plan and required approval for bonuses and other expenditures not consistent with the plan. KATY could reject a proposed operating plan and require submission of an amended plan. However, no evidence has been presented indicating that any of Walsh's plans were rejected or modified at KATY's suggestion.

C. Plaintiff's "Belief" Regarding the Identity of his Employer

The Court finds the Plaintiff was aware that Walsh was his nominal employer. Walsh issued Plaintiff's W-2 forms and paychecks, including his severance pay. Plaintiff identified Walsh as his employer on a home equity loan application and as his former employer on his application for unemployment compensation benefits. Additionally, Plaintiff observed Heyda

and other Walsh employees making Walsh's day-to-day operating decisions.

Furthermore, at the time of his discharge Plaintiff was unaware of the evidence he now presents, such as commingling of bank accounts and corporate officials. Plaintiff states he did not know who was in charge of employment matters at Walsh, including who was responsible for hiring and firing employees. Plaintiff also states he did not know the identity of Walsh's and KATY's directors, much less whether the companies shared directors.

D. Decision-Maker in Plaintiff's Discharge

Although Plaintiff argues that KATY effectively made the decision to discharge Plaintiff, the Court finds that Heyda made that decision. The parties agree that the layoff of some of Walsh's employees resulted from a decision to discontinue Walsh's manufacture of presses. However, the parties disagree about who made the latter decision. Plaintiff argues the decision was imposed by KATY, and that Heyda's ensuing decision to terminate Plaintiff and other Walsh employees was a *fait accompli*. On the other hand, Defendant contends Heyda made the decision to discontinue production and whom to discharge as a result.

As only a fraction of Walsh' staff was laid off and Plaintiff does not dispute that Heyda determined which members of Walsh's staff would be laid off, the Court finds that Walsh made the decision to discharge Plaintiff. Even if KATY made the decision to discontinue Walsh's production of presses, that decision did not inevitably lead to Plaintiff's discharge. According to the testimony of both Heyda and KATY's vice president overseeing Walsh's industry, Heyda decided who would stay and who would go. Plaintiff, in fact, knew that Heyda was making the decision; after the decision to discontinue press production and prior to the May meeting,

Plaintiff asked Heyda about whether he would be laid off. Heyda replied that he had not decided yet.

III. Analysis

Under the A.D.E.A. and the A.D.A., "employers" are prohibited from discriminating against employees on the basis of age and disability, respectively. 29 U.S.C. § 623; 42 U.S.C. § 12112(a). However, both the A.D.E.A. and A.D.A. statutes define "employer" so as to exclude particularly small businesses from the statutes' coverage. Under the A.D.E.A., an "employer" is defined as an entity "engaged in an industry affecting commerce" which has twenty or more employees for each working day in each of twenty or more calendar weeks in the calendar year of or the year prior to the alleged discrimination. 29 U.S.C. § 630(b). The A.D.A. defines an "employer" similarly, except that the number of employees required is fifteen, if the alleged discrimination occurred on or after July 26, 1994 (the second anniversary of the statute's effective date), and twenty-five if the alleged discrimination occurred prior to that date. 42 U.S.C. § 12111(5)(A); *Villasenor v. Industrial Wire & Cable, Inc.*, 929 F. Supp. 310, 313-14 n. 4 (N.D.Ill.1996) (applying definition in effect at time of discriminatory act, not at time the action was filed); *see also*, *Landgraf v. U.S.I. Film Products*, 114 S.Ct. 1483 (1994)(law in effect at time of relevant conduct ordinarily applied). An entity which does not meet these definitions is not covered by the prohibitions of the A.D.E.A. or A.D.A. Accordingly, the Court does not have subject matter jurisdiction over an action alleging violation of those prohibitions. *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 579 (7th Cir.1993) (A.D.E.A.); *Line*, 1997 WL 538715, * 2 (A.D.A.).

Defendant contends the Court lacks subject matter jurisdiction over this matter because the alleged discriminatory act occurred in May 1994 and Walsh, Plaintiff's nominal employer, was not an employer under either the A.D.E.A. or A.D.A. Plaintiff, on the other hand, contends the Court does

have jurisdiction for two reasons: (1) Walsh employed a sufficient number of employees to be considered an employer under the A.D.A.; and (2) Walsh and KATY should be treated as a single employer and the combined entity would be an employer under both the A.D.E.A. and the A.D.A. The Court considers Plaintiff's arguments in turn.

A. Walsh as a "Stand-Alone" Employer

Walsh, standing alone, did not have twenty or more employees for twenty or more weeks in either 1993 or 1994, but did have fifteen or more employees for twenty or more weeks in 1993. Accordingly, Walsh, standing alone, was not an employer under the A.D.E.A. and was an employer under the A.D.A. only if the post-July 26, 1994, fifteen-employee definition of "employer" applies. Plaintiff argues the post-July 26, 1994 definition applies; Defendant argues the pre-July 26, 1994 definition applies.

In general, the law in effect at the time of the relevant conduct governs an action. *Landgraf*, 114 S.Ct. at 1497. "[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Id.* (quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1586 (1990) (Scalia, J., concurring)). However, the parties differ on what the relevant conduct was in this action: Defendant contends the alleged discriminatory act occurred in May 1994, when Plaintiff was informed that he would be terminated shortly thereafter as part of a reduction-in-force; Plaintiff contends the discriminatory act occurred when he was actually terminated, on July 31, 1994. Accordingly, the parties disagree as to whether the pre- or post-July 26, 1994 definition of "employer" applies in this action.

Although the Seventh Circuit has not ruled on this precise issue, related case law suggests the relevant conduct was Walsh's decision to terminate Plaintiff and its communication

of that decision to Plaintiff. In the context of determining when the statute of limitations begins to run in A.D.A. and other civil rights cases, the Seventh Circuit has held the clock begins to run when the "injury" is suffered. In the case of discharge, the injury is suffered when the termination decision is communicated to the employee, not when the employee is actually terminated. *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir.1995); *Graehling v. Village of Lombard, Illinois*, 58 F.3d 295, 296-97 (7th Cir.1995). More broadly, the Seventh Circuit has held that "[o]nly the original decision to let the employee go is subject to analysis under the anti-discrimination laws." Graehling, 58 F.3d at 296.

In accordance with these cases, the Court finds that the alleged discrimination occurred in May 1994 and, consequently, the "employer" definition in effect at that time applies in this action. In determining either which law to apply or when to start running the limitations period, the Court is primarily interested in identifying when the employee allegedly suffered a discriminatory act. Hence, the Seventh Circuit's conclusion that the "injury" occurred when the termination decision was communicated is applicable to either determination. Plaintiff's arguments to the contrary are unpersuasive. None of the cases cited by Plaintiff addresses whether the injury occurs on notification or termination, much less which definition of "employer" to use. Indeed, in each case the plaintiff apparently was notified and terminated at the same time, so the courts had no reason to even consider the issue. Therefore, the Court concludes that the law in effect in May 1994, when Plaintiff was informed that he would be terminated, governs this action.

Consequently, the Court finds that Walsh, which standing alone did not employ at least twenty-five employees for twenty or more weeks in either 1993 or 1994, is not an employer under the A.D.A.

B. Walsh and KATY Treated as Single Employer

Two interrelated, but nominally-separate, business entities may be considered a "single employer" for purposes of applying the definition of "employer" in anti-discrimination cases. *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 582 (7th Cir.1993) (applying "single employer" theory to A.D.E.A.). As KATY and Walsh together had well over twenty-five employees throughout 1993 and 1994, if Walsh and KATY are considered a "single employer" the combined entity would be an "employer" under both the A.D.E.A. and the A.D.A.

In determining whether to treat nominally-separate entities as a single employer, the Court considers four factors: (1) interrelation of operations, i.e. common offices, common record keeping, shared bank accounts and equipment; (2) common management, common directors and boards; (3) centralized control of labor relations and personnel; (4) common ownership and financial control. *Id.* Given the purpose of the anti-discrimination laws, "control over the elements of labor relations is a central concern." *Id.* (citing *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir.1983)). In the parent-subsidiary context, as present here, "[w]hen the parent exercises such extensive control over the subsidiary's operations and personnel decisions that, in effect, the two corporations are one, courts are willing to consider the parent along with the subsidiary as the employer subject to the applicable statute." *Id.* However, slight overlaps in operations are not sufficient to warrant application of the single-employer theory. "The showing required to warrant a finding of single employer status has been described as 'highly integrated with respect to ownership and operations." *Id.* at 583 (quoting *McKenzie v. Danvenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir.1987)).

Based on the facts presented above, the Court finds that Walsh and KATY did not have "highly integrated" operations

and, consequently, they should not be considered as a single employer. Physically, the facilities of Walsh and Katy were miles apart. Perhaps more importantly, KATY exercised little day-to-day control over Walsh's operations. Heyda was primarily responsible for Walsh's day-to-day decisions, including those involving labor relations. In particular, Heyda made the decision to discharge Plaintiff. While KATY certainly was involved in monitoring Walsh's financial performance and strategic decision-making, such as the decision to cease Walsh's production of presses, this type of involvement does not establish the necessary degree of interrelatedness to warrant applying the single-employer theory. Indeed, such involvement is undoubtedly typical for parent-subsidiary relationships. More than such "normal" interrelatedness is required to find that the parent and subsidiary should be considered as one. *Armbruster*, 711 F.2d at 1337 (cited approvingly by *Rogers*, 7 F.3d at 583).

Plaintiff's arguments to the contrary are unpersuasive. Aside from arguing that the interrelationships were substantial, an argument the Court considered above, Plaintiff argues he had a "justifiable belief" that Walsh and Katy were a single employer and, therefore, Walsh and KATY should be treated as a single employer. The Court does not agree that such a belief, alone, is sufficient to warrant application of the single-employer theory. The *Rogers* court quotes Armbruster as holding that "the most important requirement is that there be sufficient indicia of an interrelationship ... to justify the belief on the part of an aggrieved employee that the affiliated corporation is jointly responsible for the acts of the immediate employer." *Rogers*, 7 F.3d at 583. However, the *Rogers* court then focuses on the four-factor, objective test in evaluating whether to treat the two companies in question as a single employer. Furthermore, the Court finds that Plaintiff did not have such a "justifiable belief." Plaintiff knew that Walsh was his nominal employer and he was in a position to know that Heyda was responsible for Walsh's day-to-day operations.

Also, Plaintiff's deposition testimony establishes that he was unaware of most of the evidence he now presents regarding the supposed interrelationships between Walsh and KATY. Accordingly, even if Plaintiff believed Walsh and KATY were tightly interrelated, he fails to establish that his belief was justified by what he knew at the time of the discharge decision. To the extent that Plaintiff argues his after-acquired knowledge is relevant to determining whether his belief was "justifiable", the Court finds that the objective, four-factor test is the more appropriate means of considering this information.

Therefore, the Court rejects Plaintiff's argument that Walsh and KATY should be treated as a single employer and considers only Walsh's employment figures in determining whether it is an "employer" within the meaning of the A.D.E.A. or A.D.A. As the Court found above, in 1993 and 1994 Walsh had an insufficient number of employees to be an employer under either the A.D.E.A. or A.D.A. Accordingly, the Court finds it does not have subject matter jurisdiction over this action and dismisses the action pursuant to F.R.C.P. 12(b)(1).

III. Conclusion

For the foregoing reasons, the Court dismisses this action for lack of subject matter jurisdiction.

APPENDIX C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

March 18, 1999

Before

Hon. Richard A. Posner, Chief Judge

Hon. William J. Bauer, Circuit Judge

Hon. Terence E. Evans, Circuit Judge

JAMES PAPA, *Plaintiff-Appellant,*	}	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 98-2009 v.	}	
KATY INDUSTRIES, INC. AND WALSH PRESS COMPANY, INC., *Defendants-Appellees.*	}	No. 95 C 5290
	}	John A. Nordberg, *Judge.*

ORDER

On February 22, 1999, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore **DENIED**.

Supreme Court, U.S.
FILED
OCT 18 1999
OFFICE OF THE CLERK

No. 99-284

IN THE

Supreme Court of the United States

JAMES PAPA,

Petitioner,

v.

KATY INDUSTRIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF PARTIES AND RULE 29.6 STATEMENT

Respondent Katy Industries, Inc. is a publicly held corporation, and Gabelli Funds, Inc. is the beneficial owner of 18.77% of its outstanding stock.

Respondent Walsh Press Company, Inc. is a wholly-owned indirect subsidiary of Katy Industries, Inc.

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STATEMENT OF THE CASE

Both the Age Discrimination in Employment Act ("ADEA") and the Americans With Disabilities Act ("ADA") define "employer" to require that, to be covered by the acts, an employer must (a) affect interstate commerce and (b) have at least a specified number of employees (20 for the ADEA and 25 for the ADA during the times relevant here).[1] The Petitioner's employer, Walsh Press Co., Inc., concededly did not meet these minimum-number requirements. R. 22, ¶¶ 5-6. The Petitioner therefore sued not only Walsh, but Walsh's ultimate corporate parent, Katy Industries, Inc., claiming that the separate corporations should be aggregated to satisfy the minimum-number requirements. R. 1, ¶ 7. The sole issue is whether there is a basis to aggregate the corporations as the Petitioner's "single employer."

The Petitioner suggests that the Seventh Circuit found "substantial integration" between Walsh and Katy, sufficient to satisfy a so-called "four-factor test" used by the NLRB. Petition at 6. This suggestion is untrue. The district court, considering the four factors urged by the Petitioner to evaluate the facts developed in the summary judgment briefing, held there was no basis to aggregate Walsh and Katy. App. B-10-11. The Seventh Circuit likewise held there was no basis to aggregate Walsh and Katy, though it refined the framework for evaluating the facts. App. A-9-10.

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1. 29 U.S.C. § 630(b) (ADEA); 42 U.S.C. § 12111(5)(A) (ADA). The minimum number under the ADA changed from 25 to 15 on July 26, 1994. The district court held that the 25-employee requirement applied here because the Petitioner was notified of his layoff in May 1994 (though the layoff took effect July 31, 1994). App. B-3, 8-9. *Cf. Delaware State College v. Ricks*, 449 U.S. 250, 257-58 (1980) (claim of discrimination arises when employee is notified of adverse employment decision, not when consequences of decision occur). The Petitioner did not challenge this holding on appeal. *See* Brief of Defendants-Appellees (filed with Seventh Circuit August 28, 1998) at 8 n.3.

Nothing in the Seventh Circuit's opinion suggests that, under any framework, the criteria for aggregating Walsh and Katy would be satisfied. On the contrary, the Seventh Circuit stated that Walsh "complie[d] with all the formalities required of a subsidiary that wants to have a corporate identity different from that of its parent," and that its "integration" with its ultimate parent, Katy — e.g., by being included in Katy's group pension plan — was, so far from being "substantial," an unremarkable incident of a small firm taking advantage of the services of its corporate affiliates.[2]

Other than erroneously characterizing the Seventh Circuit's analysis, the Petitioner does not set forth the facts about the relationship among himself, Walsh, and Katy. The facts are as follows.

The Petitioner was hired as a machinist by Walsh on May 2, 1983, when he was 51 years old. R. 7, ¶¶ 12-13. Walsh

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2. App. A-2; *see* App. A-8-9:

> Firms too tiny to achieve the realizable economies of scale or scope in their industry will go under unless they can integrate some of their operations with those of other companies, whether by contract or by ownership. The choice between the two modes of integration is unrelated to the [small-employer] exemption. Take contractual integration first. A firm too small to have its own pension plan will join in a multiemployer pension plan or will in effect pool with other employers by buying an insurance policy. . . . [Such] contractual integration would [not] subject tiny employers to the antidiscrimination laws, because the integration is not of affiliated firms. Why should it make a difference if the integration takes the form instead of common ownership, so that the tiny employer gets his pension plan . . . from his parent corporation without contractual formalities, rather than from independent contractors?
>
> That is all that's involved in the case[ ] before us. . . .

was a manufacturer and servicer of power presses, located in Forest Park, Illinois. R. 7, ¶ 5.

In 1987 Walsh was acquired by and became a subsidiary of American Gage & Machine, which in turn is a wholly-owned subsidiary of Katy, a holding company. R. 22, ¶ 35. Katy was the ultimate parent of a substantial number of operating companies in three principal groups (Industrial Machinery, Industrial Components, and Consumer Products). R. 26, Ex. 16. Katy was a Delaware corporation, located in Elgin, Illinois until 1994 and in Englewood, Colorado thereafter. R. 22, ¶ 39.

The record fully supports the Seventh Circuit's statement that Walsh complied with all corporate formalities required to maintain its separate corporate identity: Walsh and Katy had separate facilities (R. 22, ¶ 39), separate equipment (*id.* ¶ 41), separate supplies (*id.* ¶ 40), separate corporate records (*id.* ¶ 44), separate directors (*id.* ¶ 56), and separate workers (*id.* ¶ 23). Walsh paid its own taxes, handled its own payroll, and issued its own W-2s. *Id.* ¶¶ 11-12, 80. Walsh's president, Jerome W. Heyda, had been employed by Walsh since 1972 and never worked for Katy. *Id.* ¶ 9; R. 23, Exs. 3-4. Heyda, and no employee of Katy, hired the Petitioner and directed his work. R. 22, ¶¶ 8, 10. Heyda had authority to hire, fire, discipline, and determine compensation (limited only by Walsh's self-created annual budget) for Walsh employees without Katy's consent or approval. *Id.* ¶¶ 64-66; R. 32, ¶¶ 38-43. Heyda, and not Katy, directed Walsh's day-to-day operations. *Id.* ¶ 73.

There were, of course, some contacts between Walsh and Katy. Like the other operating companies, Walsh submitted annual business plans, serving as budgets, to Katy. *Id.* ¶ 74. Walsh also provided Katy monthly financial reports regarding profits and losses, cash flow, and inventory. *Id.* ¶ 76. Katy

made certain services available to its affiliates. For example, though Walsh obtained health insurance for its employees on its own, it obtained (and paid for) workers' compensation, employee disability, liability, and vehicle insurance from carriers selected by Katy. *Id.* ¶¶ 71-72. Until 1990, Walsh provided its employees a 401(k) plan, but thereafter Katy made a group 401(k) plan available to its subsidiaries; like all the subsidiaries, Walsh adopted that plan and paid the employer contributions. *Id.* ¶¶ 78-79. Though Walsh had certain individual bank accounts, Katy also provided a bank account to its subsidiaries, with subaccounts for each company; when Walsh drew on its subaccount, the transaction was charged to Walsh. R. 22, ¶ 43; R. 32, ¶ 24. A Katy employee assisted Walsh in setting up a computer system. R. 23, ¶ 88; R. 22, ¶ 21. A Katy employee spent two days at Walsh assisting in the removal of an underground storage tank. R. 32, ¶ 85. Katy employees were available to consult on accounting, legal, environmental, and tax matters. *Id.* ¶ 86. Some of Katy's officers also served as officers or directors of Walsh, though they were not involved in Walsh's labor and employment decisions. R. 22, ¶¶ 57-58; R. 32, ¶¶ 5-12.

Walsh did not meet its plans and was not profitable in 1993 and afterward. R. 32, ¶¶ 4, 19. In early 1994 a decision was made to discontinue part of Walsh's operations, the manufacture and rebuilding of presses, because it was not profitable. R. 22, ¶ 82. The parties disputed below who made that decision: Heyda and the Katy officer with whom he spoke testified that Heyda made the decision, but the Petitioner contended Heyda had said the decision was "corporate" and "not his." *Id.*; R. 32, ¶¶ 44-53. The Seventh Circuit assumed that Katy made the decision. App. A-2. In any event, there is no dispute that it was Heyda who chose which employees to lay off as a result of the discontinuance. R. 26, ¶¶ 27-29. In March or April 1994 Heyda told Walsh employees there would be layoffs, though he had not yet

decided which employees would be affected. *Id.* ¶¶ 27-28. In May 1994 Heyda announced that certain employees, including the Petitioner, would be laid off. *Id.* ¶¶ 29-30. The Petitioner's last day was July 31, 1994. *Id.* Walsh never regained profitability. R. 32, ¶¶ 4, 19. In April 1996 the assets of Walsh were sold, and Walsh is no longer an operating company. R. 22, ¶ 38.

The Petitioner named both Katy and Walsh in his complaint, contending that they should be considered a "single employer." He urged that his claim be analyzed using four considerations used in certain circumstances by the NLRB: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. He argued that there was interrelation, commonality, and centralization by invoking such matters as the services Katy afforded its subsidiaries (group insurance, employee benefits plans, consolidated tax returns and annual reports, subaccounts in its bank account, consulting on matters like computer system setup) and the reporting lines from Walsh to Katy (annual plans/budgets, monthly financial reports).

The Petitioner even contended that Katy admitted it was his employer. For example, he argued that Katy so admitted by reporting the total number of employees of the affiliated companies in its annual report (Brief of Plaintiff-Appellant (filed with Seventh Circuit June 30, 1998) at 22) — overlooking that it was a *consolidated* report. He particularly emphasized that COBRA benefits were offered to Walsh's departing employees, and that since COBRA "of course only extends to employers employing 20 employees," Katy thereby admitted that Walsh's employees should be aggregated for employment law purposes. *Id.* at 22-23; Reply Brief of Plaintiff-Appellant (filed with Seventh Circuit Sept. 25, 1998) at 7. He overlooked that, although COBRA applies

only to "employers" with 20 or more employees, COBRA defines "employer" as including all affiliated companies in the aggregate.[3]

The Petitioner particularly urged that Katy's asserted decision that Walsh should discontinue a portion of its business constituted "control of labor relations" at Walsh, on the ground that the decision inevitably would lead to layoffs. Brief of Plaintiff-Appellant at 8-10, 23.

After discovery, the defendants moved for summary judgment on the ground that the minimum-number requirements of the ADEA and ADA were not met. R. 20. The district court treated the motion as one challenging subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1),[4] and dismissed the case. App. B-1-12. Using the "four-factor" framework requested by the Petitioner, the district court observed that the evidentiary record did not show that the relationship between Walsh and Katy was anything other than

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3. *See* IRC § 414(t) (providing that certain sections, including section 4980B (COBRA), are subject to "controlled group rules," requiring that employees of affiliated companies be "treated as employed by a single employer"); 64 Fed. Reg. 5160, 5162, 5175 (Feb. 3, 1999) (implementing same, in same manner as prior proposed regulations).

4. Several circuits treat this question as one of subject-matter jurisdiction. *Hukill v. Auto Care, Inc.*, 1999 WL 739407, at *4 (4th Cir. Sept. 22, 1999); *Armbruster v. Quinn*, 711 F.2d 1332, 1335 (6th Cir. 1983); *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 392 (8th Cir. 1977); *Childs v. Local 18, IBEW*, 719 F.2d 1379, 1382 (9th Cir. 1983); *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 932 (11th Cir. 1987). The Seventh and D.C. Circuits treat it not as jurisdictional but as an element of the plaintiff's substantive case. *Komorowski v. Townline Mini-Mart & Restaurant*, 162 F.3d 962, 964 (7th Cir. 1998); *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 623-24 (D.C. Cir. 1997). In either case, the question is one susceptible to summary judgment on an evidentiary record like that developed here.

that of separate, affiliated companies. App. B-3-5, 10-11. In particular, the evidence did not suggest that there was "such extensive control over the subsidiaries' operations and personnel decisions that, in effect, the two corporations are one." App. B-10. Nor did the record show that the Petitioner was misled about the identity of his employer — a fifth factor also suggested as important. App. B-5-6, 11.

On review, the Seventh Circuit affirmed, but refined the framework of analysis. It noted that both it and other circuits have often "structur[ed] their analysis" of this kind of question by "cit[ing] or recit[ing]" the four factors. App. A-3-4; *see, e.g., Rogers v. Sugar Tree Prods., Inc.*, 7 F.3d 577, 582 (7th Cir. 1994). But because that bare recitation does not prescribe how to weigh the considerations, and because the factors as stated are either "useless" (all parents/subsidiaries have "common ownership") or "vague" (how "integrated" must two companies be to be aggregated?), App. A-4, the court restated more directly and precisely the circumstances in which courts find it appropriate to aggregate the employees of separate companies for purposes of the minimum-number requirements of the employment discrimination laws. In doing so, the Seventh Circuit did not itself believe it was substantively departing from its prior opinions, like *Rogers*: if it did, it would have been required by Seventh Circuit Rule 40(e) to circulate the opinion to the entire court for en banc consideration before publication.

Putting unhelpful labels aside, the Seventh Circuit described three situations in which courts should and do aggregate nominally separate companies for purposes of employment discrimination laws: (1) when the nominal separateness of the companies would be disregarded under traditional and well-developed corporate-veil-piercing analysis; (2) when the discriminatory conduct complained of was actually that of the nominally separate company; and (3) when an enterprise splits itself into a number of companies, separate in form, for the express purpose of

evading liability under the employment discrimination laws. App. A-5-8. Because none of these circumstances existed here (or in another case the Seventh Circuit consolidated with *Papa v. Katy* for decision, presenting a similar question under the minimum-number requirement of Title VII[5]), the Seventh Circuit affirmed. App. A-10-11.

REASONS FOR DENYING THE WRIT

The Petition is based at heart on three propositions: (1) that there exists a crisp "four-factor test" of corporate separateness, created by the Labor Board and applied in traditional labor cases under the NLRA; (2) that such a Board test has been adopted by many circuits as the test for determining corporate separateness under the antidiscrimination laws, and must be applied liberally in light of the statutes' remedial purposes; and (3) that the Seventh Circuit's decision below adopts a radically different and inconsistent test, creating a frank circuit split. None of these propositions is true.

As discussed in Section I, there is no underlying strict "four-factor test" in the traditional labor context. The Labor Board approach, as refined and developed in NLRA cases, treats the "four factors" as neither rigid nor exclusive, and in fact parallels the Seventh Circuit's approach, by: (1) deeming "actual control of labor relations" the critical issue, and "common ownership" insignificant; (2) using traditional veil-piercing inquiries; and (3) disregarding corporations' separateness when the corporations have been split for the purpose of evading the law.

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5. The Petitioner noted that the time for filing the Petition was extended to coordinate more closely with the schedule in the other case, *EEOC v. GJHSRT, Inc.*, in which any petition for writ of certiorari by the EEOC would be due by September 11, 1999. Petition at 2 n.1. The EEOC did not, however, file a petition for writ of certiorari in *GJHSRT*.

As discussed in Section II, though many circuits have adopted the "four-factor" designation in discrimination cases, in substance their approaches parallel those of the Board, and are likewise substantively in harmony with the Seventh Circuit's approach. The Seventh Circuit's innovation was more in name than in substance. The "four factors" do not accurately describe the courts' actual analyses. By placing more direct and accurate names on analyses familiar to the other circuits, the Seventh Circuit did not create a circuit split calling for review.

Indeed, if any conflict is presented here, it is between the position advocated by the Petitioner and the decisions of this Court. The Petitioner's open plea to read into the antidiscrimination statutes a liberal rule for overriding corporations' limited liability, based on nothing more than the statutes' remedial purpose, Petition at 7-10, flies directly in the face of *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 1885 (1998), in which the Court held that, despite a statute's remedial purpose, "the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law,' " and that "when (but only when) the corporate veil may be pierced may a parent corporation be charged with derivative . . . liability for its subsidiary's actions." (alteration in original) (footnote omitted) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)).

Nor is the issue raised here one of exceptional importance, either in the present case or in general, so as to call for review. As discussed in Section III, there is no exceptional importance in the present case, for the facts cannot support aggregation of Katy and Walsh under any test. Nor is there exceptional importance in the abstract, for there is no substantive split of authority in need of resolution.

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT SPLIT FROM DECISIONS UNDER THE NLRA.

The Petitioner asserts that a "four-factor test" — supposedly "formulated by the National Labor Relations Board" and "approved" by the Court — is "uniquely appropriate" for determining when nominally separate firms should be treated as a single employer under federal antidiscrimination statutes, and that the Seventh Circuit's decision conflicts with this test. Petition at 9. These assertions are untrue: (1) the Board never said the four factors are a rigid "test," nor has the Court done so; and (2) the practice in NLRA cases does not conflict with the Seventh Circuit's decision.

A. There is no Rigid Four-Factor Test for NLRA Cases.

The Petitioner's claim that courts should use the "four-factor test" in cases arising under federal antidiscrimination statutes rests on the unstated premise that the Board actually decreed — and the Court has mandated — a rigid test for deciding "single employer" issues in traditional labor cases. But the premise is incorrect. The four factors were not formulated as a rigid test, nor have they been so applied in NLRA cases. On the contrary, the practice under the NLRA mirrors rather than contrasts with the Seventh Circuit's approach.

1. *Origins of the "Four Factors."*

The Petitioner does not discuss the origins or use of the supposed "four-factor test;" he merely claims that the Board "formulated" it and the Court "approved" it. Petition at 9. This bare assertion masks a rich history during which the Board developed the "single employer" doctrine, both as a

principle for asserting discretionary jurisdiction[6] and as one of many theories for imposing joint and several liability for unfair labor practices.[7] *See, e.g., Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 504 (5th Cir. 1982); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 551-52, 553-54 (3d Cir. 1983).

In its 1956 Annual Report, which the Court cited in *Radio & Television Broadcast Technicians Local Union 1246 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (per curiam), the Board discussed the early development of the single employer doctrine:

> In applying present [self-imposed] jurisdictional standards, the Board early reaffirmed the long-established practice of treating separate concerns which are closely related as being a single employer for purposes of determining whether to assert jurisdiction. The question in such cases is whether the enterprises are sufficiently integrated to consider the business of both together in applying the jurisdictional standards.

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6. Although the Board has jurisdiction over all labor disputes affecting interstate commerce, regardless of the employer's size, it does not assert jurisdiction in all cases. Instead, the Board applies self-imposed jurisdictional minimums, often stated in terms of minimum gross revenues. *See, e.g., Radio & Television Broadcast Technicians Local Union 1246 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 255-56 (1965) (per curiam) ($100,000 minimum for radio stations). In determining whether a particular firm meets the jurisdictional minimum, the Board will consider whether two or more firms constitute a single employer. *See, e.g., Parklane Hosiery Co.*, 203 N.L.R.B. 597, 598 (1973).

7. As discussed in Section I.B. below, the Board will impose joint and several liability for unfair labor practices on nominally separate firms in a variety of circumstances, even when it does not find that the two firms constitute a "single employer." *See, e.g., id.* at 613-19.

> The principal factors which the Board weighs in determining whether sufficient integration exists include the extent of:
>
> 1. Interrelation of operations;
> 2. Centralized control of labor relations;
> 3. Common management; and
> 4. Common ownership or financial control.
>
> No one of these factors has been held to be controlling, but the Board opinions have stressed the first three factors, which go to show "operational integration," particularly centralized control over labor relations. The Board has declined in several cases to find integration merely upon the basis of common ownership or financial control.

21st Annual Report of the National Labor Relations Board at 14-15 (1956), *quoted in Sakrete of N. Cal., Inc. v. NRLB*, 332 F.2d 902, 905 n.4 (9th Cir. 1964) (*enforcing* 137 N.L.R.B. 1220 (1962)).

This statement, with its list of non-exclusive considerations, is the root of the "four-factor test" urged by the Petitioner. In *Radio Union*, the Court "recognized" the criteria that the Board had considered in applying the single employer doctrine. *South Prairie Const. v. Local 627*, 425 U.S. 800, 802 & n.3 (1976) (per curiam). But contrary to the Petitioner's assertion (Petition at 9), the Court did not "approve" these criteria as a "four-factor test," as the context in which *Radio Union* arose makes clear.

The case concerned whether Alabama state courts erred in assuming jurisdiction over a picketing dispute. The state courts could assume jurisdiction only if the Board declined to assert it, a decision resting in the Board's discretion. *Radio Union*, 380 U.S. at 256. Because the Board had not considered whether to assert jurisdiction, the Court looked at the factors the Board would consider. *Id.*, *citing*, *e.g.*, NLRB 21st Annual Report at 14-15 and *Sakrete*. The Court noted that evidence supported each of the criteria, raising at least the possibility that the Board might exercise jurisdiction.[8] In those circumstances, the Court held that the Alabama courts erred in asserting jurisdiction. *Id.* at 257. The Court therefore neither mandated factors for the Board to consider in future cases nor foreclosed it from refining the single-employer doctrine.

2. *Refinement of the "Four Factors" By the Board.*

In fact, the Board *has* refined how it approaches single-employer issues. Though it has frequently cited *Radio Union* and referred to the four criteria listed in its 1956 Annual Report in single-employer-doctrine cases,[9] it has also repeatedly stated (echoing a theme of the 1956 Report) that "[n]one of these factors, alone, is controlling, nor need all of them be present." *Emsing's*, 284 N.L.R.B. at 302. *See also*, *e.g.*, *Sakrete*, 322 F.2d at 905 n.4 (*enforcing* 137 N.L.R.B. 1220 (1962)).

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8. Indeed, the United States as amicus curiae "confirm[ed] the view that the Board's standards for determining a single employer were fully satisfied," 380 U.S. at 257 n.*, making it unnecessary for the Court to consider the weight the Board would give the criteria, much less how it would rule if evidence of certain criteria — such as centralized control over labor relations — were lacking.

9. *See*, *e.g.*, *Parklane Hosiery*, 203 N.L.R.B. at 612; *Emsing's Supermarket, Inc.*, 284 N.L.R.B. 302, 302 & nn.3-5 (1987), *enforced*, 872 F.2d 1279, 1289 (7th Cir. 1989); *Dow Chem. Co.*, 326 N.L.R.B. No. 23, 1998 WL 560744, at *3 (NLRB Aug. 24, 1998).

As the Board has refined and developed the single employer doctrine over several decades, it has made clear that the "critical" consideration is whether one firm actually controls another nominally separate firm's labor relations. *See, e.g., Parklane Hosiery*, 203 N.L.R.B. at 613 ("[the] Board has long held that the most critical factor relied upon when it considers whether a joint employer relationship exists will be the control which one party may or may not exercise with respect to another's labor relations"); *Western Union Corp.*, 224 N.L.R.B. 274, 277 (1976) ("evidence to support a finding of central control over labor relations policies" is "the critical factor" — and a "requisite" one — in deeming separate firms a single employer), *enforced, United Tel. Workers v. NLRB*, 571 F.2d 665, 667 (D.C. Cir. 1978); *Dow Chem. Co.*, 1998 WL 560744, at *4 ("centralized control of labor relations" is "the 'critical' factor"); *Emsing's*, 284 N.L.R.B. at 302 (finding a single employer when "all management decisions of any significance" and "labor relations policies" for two nominally separate stores were "made jointly" by the stores' co-owners). Such control must be "actual and active," not merely "potential." *Western Union*, 224 N.L.R.B. at 276.

The Board's refinement of its approach has also made the "common ownership" consideration fade to insignificance. For example, in *Dow Chemical* it noted that common ownership will "of course" be present when the nominally separate firms are a parent and subsidiary, and cannot "alone . . . establish the single-employer relationship." 1998 WL 560744, at *2. "Common ownership by itself indicates only potential control over the subsidiary by the parent entity; a single-employer relationship will be found *only if* one of the companies exercises actual or active control over the day-to-day operations or labor relations of the other." *Id.* (internal footnote omitted) (emphasis added), *citing Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 N.L.R.B. 303, 304 (1970), *enforced*, 443 F.2d 1173 (9th Cir.

1971). In *Western Union*, the Board rejected the ALJ's finding that a parent and four subsidiaries were a single employer because "only common ownership is present here," and "common ownership is not determinative when [the] requisite common control is not shown." 224 N.L.R.B. at 276 & n.3. The Board refused to endorse an approach that "would result in an automatic finding in every case that a wholly owned subsidiary or the constituent companies of a conglomerate are a single employer." *Id.* at 275.

B. There is no Conflict Between the Seventh Circuit and NLRA Decisions.

The Petitioner asserts that the Seventh Circuit's approach conflicts with the Board's supposedly "uniquely appropriate" and "uniquely crafted" "four-factor test" (Petition at 9, 12), without discussing any of the Board's decisions or how the Board has crafted them. In fact, the Seventh Circuit's approach echoes, and does not conflict with, the Board's approach in the foregoing cases. For example, the Seventh Circuit's observation that "common ownership," by itself, is "useless" (App. A-4) echoes the Board's similar observation in *Dow Chemical* and *Western Union*. The Seventh Circuit's conclusion that a parent and subsidiary may be aggregated when the parent "might have directed the discriminatory act, practice, or policy of which the employee of its subsidiary was complaining" (App. A-7) echoes the Board's view, expressed in cases like *Parklane Hosiery*, *Dow Chemical*, and *Western Union*, that actual control over labor relations is the critical consideration.

Indeed, though the Petitioner asserts that the "four-factor test" is "uniquely crafted" (Petition at 12), the single employer doctrine is not the "unique" rationale under which Board aggregates nominally separate firms. *See, e.g., NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 340 (6th Cir. 1990) ("there is no one test for deciding when to disregard the corporate form and bind the owners-operators

of a closely held corporation"). In fact, the Board uses a number of approaches in addition to the single employer doctrine, two of which echo two of the standards articulated by the Seventh Circuit.

For example, like the Seventh Circuit, the Board disregards corporations' separate existence when conditions for traditional veil-piercing are met. *See, e.g., White Oak Coal Co.*, 318 N.L.R.B. 732, 734-35 (1995) (endorsing as a matter of federal common law the two-pronged analytical framework for veil-piercing issues discussed in *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1055 (10th Cir. 1993)), *enforced mem.*, 81 F.3d 150 (4th Cir. 1996).

And just as the Seventh Circuit would disregard the separation of affiliates if they were established for the purpose of avoiding liability under the federal antidiscrimination statutes (App. A-6), the Board imposes liability under the so-called "alter ego doctrine" when "a purportedly separate business entity [is] functioning as [a] subordinate instrumentality or disguised continuance" of another firm. *Parklane Hosiery*, 203 N.L.R.B. at 614, *citing Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). *See also Al Bryant*, 711 F.2d at 553 ("the focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or a technical change in operations") (internal citation and quotation omitted); *Fullerton Transfer*, 910 F.2d at 336-37 (characterizing this approach as a "relaxed alter ego" doctrine to distinguish it from the alter ego analysis used in traditional veil-piercing cases). This "alter ego doctrine" is independent of the single-employer doctrine. For example, in *Parklane Hosiery*, the Board imposed liability on a franchisor under the alter ego doctrine (because the franchise arrangement was, in fact, a sham transaction designed to evade federal labor law),

203 N.L.R.B. at 614-19, even though it refused to impose liability under the single employer doctrine (because the franchise arrangement, "considered pro forma without regard for whatever may have motivated its formation," was facially legitimate), *id.* at 613.

The Petitioner's argument that the analysis applied in cases under the NLRA should serve as the model for the proper analysis in antidiscrimination statute cases — asserted without examination of the NLRA cases — therefore falters at the outset. The Petitioner's premise that the Seventh Circuit radically departed from the NLRA approach evaporates upon examination.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CREATE A SPLIT OF DECISIONS UNDER FEDERAL ANTIDISCRIMINATION STATUTES.

The Petition argues that the remedial purpose of the antidiscrimination laws calls for a rule allowing distinctions between affiliated corporations to be disregarded more liberally than traditional veil-piercing would allow; that many circuits have adopted the "four-factor test" as that liberal rule; and that the Seventh Circuit's decision to the contrary creates a circuit split calling for review.

A. No Conflict with This Court Exists.

If it were true that the other circuits adopted a liberal corporate disregard rule based on the statutes' remedial purpose, *they* would be in conflict with the decisions of the Court. The Court made clear in *Bestfoods* that respect for corporate distinctions is a fundamental principle of our law that Congress cannot override unless it does so expressly; the remedial nature of a statute is not enough. 118 S. Ct. at 1884-85. If Congress is silent, a parent company may still be held to account with its subsidiary in at least two situations: when the traditional test for piercing the corporate

veil is met (*id.* at 1885-86), and when the parent itself commits the wrongful conduct at issue (*id.* at 1886-88). These are precisely two of the situations in which the Seventh Circuit recognized that distinctions between corporations may be disregarded. If doing so put the Seventh Circuit in conflict with other circuits, it would be on the right side of the conflict.

B. Generalized Claims of Conflict Are Wrong.

But such conflict does not exist. The Petitioner asserts there is a three-way circuit split by tallying which courts have used the phrase "four-factor test." Petition at 12-15. That label is less important, however, than the substance of what the circuits have said.

For example, the Petitioner counts the Fifth Circuit as embracing liberal construction in light of ADEA's remedial purpose, and as having "expressly . . . adopted the four-factor test" (Petition at 8, 12), even though in *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777-78 & n.3 (5th Cir. 1997), the Fifth Circuit held that ADEA "plainly contains no basis for disregarding the venerable corporate law principle of limited liability or for otherwise extending liability to a parent corporation for the discriminatory acts of its subsidiary;" that the proper "analysis ultimately focuses on the question whether the parent corporation was a final decision-maker in connection with the employment matters underlying the litigation;" that "[t]he doctrine of limited liability creates a strong presumption that a parent corporation is not the employer of its subsidiary's employees;" that "[o]nly evidence of control suggesting a significant departure from the ordinary relationship between a parent and its subsidiary — domination similar to that which justifies piercing the corporate veil — is sufficient to rebut this presumption;" that because it is

> mindful that "the doctrine of limited liability was originally formulated . . . to implement both economic and democratic goals" and that approaches to piercing the corporate veil which fail to recognize these important public policy considerations underlying the doctrine "are deficient," . . . before piercing the corporate veil in the employment discrimination context, we and other courts have focused . . . on whether the parent corporation was so involved in the daily employment decisions of the subsidiary as to justify treating the two corporations as a single employer;

and that "[c]ommon management and ownership are ordinary aspects of a parent-subsidiary relationship . . . [so] the mere existence of common management and ownership are not sufficient to justify treating a parent corporation and its subsidiary as a single employer."[10] The Petitioner's categorization of the circuits is too shallow to be helpful: there is no actual conflict between the Fifth and Seventh Circuits to resolve.

C. Specific Claims of Conflict are Wrong.

The Petitioner claims that the Seventh Circuit conflicts with other circuits in several specific ways. These specific claims of conflict are equally frail.

1. *Limited Corporate Liability Principle.*

For example, the Petitioner claims the Seventh Circuit is in conflict with other courts by adhering to the common-law presumption of limited corporate liability, which he

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10. (Citation omitted.) The Petition purports to quote *Lusk*, 129 F.3d at 777 & n.3, as saying that a traditional veil-piercing test is "too stringent" in the employment context. Petition at 10. *Lusk* does not say this, or anything like it.

claims should be relaxed "to advance the remedial goals" of the statute. Petition at 9. But the Seventh Circuit is not alone in honoring the presumption of limited liability. In addition to *Lusk*, many other courts join *Bestfoods* in doing so.[11]

2. *Traditional Veil-Piercing.*

The Petitioner also claims the Seventh Circuit conflicts with other courts by invoking the concept of traditional veil-piercing in this context. Petition at 9-10. Again, the Seventh Circuit is not alone, for many courts besides *Lusk* join *Papa* and *Bestfoods* in using the veil-piercing analysis.[12] Indeed,

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11. *See, e.g., Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993) ("The doctrine of limited liability creates a strong presumption that a parent company is not the employer of its subsidiary's employees, and the courts have found otherwise only in extraordinary circumstances."); *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 980-81 (4th Cir. 1987) ("Under the doctrine of limited liability, a shareholder is not responsible for the acts of the corporation. . . . Thus, when a subsidiary hires employees, there is a strong presumption that the subsidiary, not the parent company, is the employer. . . . [C]ourts have found parent corporations to be employers only in extraordinary circumstances."); *Lockhard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1071 n.2 (10th Cir. 1998) (same); *Marzano v. Computer Science Corp.*, 91 F.3d 497, 513 (3d Cir. 1996); *Moreno v. John Crane, Inc.*, 963 F. Supp 72, 75 (D.P.R. 1997).

12. *See, e.g., Johnson*, 814 F.2d at 981 ("Courts will peer behind the corporate veil if the parent dominates the subsidiary 'to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation.' . . . In an employment context, the parent company can be the employer of a subsidiary's workers if it exercises excessive control in one of two ways. . . . In determining when a parent crosses this line, the courts have found parent corporations to be employers only in extraordinary circumstances.") (internal citation omitted); *Marzano*, 91 F.3d at 513-14; *Shepherdson v. Local Union No. 401 of Int'l Assoc. of Bridge Structural & Ornamental Ironworkers*, 823 F. Supp. 1245, 1249 & n.5 (E.D. Pa. 1993) (Cont'd)

the courts often invoke the "four factors" as elements in a veil-piercing inquiry.[13] And in some cases the courts have

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("[C]orporate law doctrines aid in determining whether under Title VII two entities can be considered a single employer, for jurisdictional and substantive purposes."); *Mas Marques v. Digital Equip. Corp.*, 637 F.2d 24, 26 (1st Cir. 1980) (considering, in combination with the four-part analysis, whether the parent would "be liable on the theory that the parent-subsidiary relationship is a sham") (whether a corporate entity is a "sham" or lacks an "arm's length" relationship with its affiliates belongs to the traditional veil-piercing lexicon, *see Wm. Passalacqua Builders v. Resnick Developers S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991); *Anderson v. Abbot*, 321 U.S. 349, 357 (1944)); *Frank*, 3 F.3d at 1362 (noting "[t]he doctrine of limited liability creates a strong presumption that a parent company is not the employer of its subsidiary's employees, and the courts have found otherwise only in extraordinary circumstances").

13. *See, e.g., Johnson*, 814 F.2d at 981 n.* (four factors are evidentiary inquiries that may be used to assess control for purposes of veil-piercing inquiry); *Odriozola v. Superior Cosmetic Distribs., Inc.*, 531 F. Supp. 1070, 1075 (D.P.R. 1982) ("the methods devised to determine whether a corporation or corporations should be considered as a single employe[r] under the ADEA are only different means of resolving the same basic inquiry"); *Armbruster*, 711 F.2d at 1335-36 & n.3 (noting that basis for its decision in *Hassell v. Harmon Foods*, 454 F.2d 199, 200 (6th Cir. 1972) — refusing to aggregate employees of parent and subsidiary because the two had separate corporate identities and were not liable for each other's debts — was not inconsistent with the four criteria considered by the NLRB); *McNeal v. Maritank Philadelphia, Inc.*, 1999 WL 80268, at *7 n.8 (E.D. Pa. Feb. 3, 1999) (analysis using the four factors borrowed from NLRB decisions "essentially the same" as determining whether one corporation is an "alter ego" of another). Some courts even embed within the "four-part test" the classic veil-piercing requirement that entities be fairly considered a "sham." *See Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 995 (6th Cir. 1997) ("If neither of the entities is a sham then the fourth test [common ownership or financial control] is not met.")
(Cont'd)

done so outside the context of aggregating employees to meet the definition of "employer," when plaintiffs sought to pierce the corporate veil for more typical reasons, such as insolvency of the subsidiary. Nothing could make more plain that the four-part test is a proxy for traditional veil-piercing analysis, and seeks to capture the same considerations.[14]

The Petitioner states that "the Seventh Circuit's veil-piercing test is undesirable because it subjects federal antidiscrimination statutes to state law veil-piercing tests that may vary widely; as a result, similarly-situated plaintiffs and employers may face different standards in each state." Petition at 10. This is a complaint properly made only to

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(internal quotation and citation omitted); *York v. Tennessee Crushed Stone Assoc.*, 684 F.2d 360, 363 (6th Cir. 1982) (under the "four factor" approach, court stated that while "there may be occasions in which it is proper to disregard the corporate entity for the purpose of finding the jurisdictionally required number of employees in a Title VII or ADEA suit, this is not such a case. There are no grounds upon which it may be said that the defendant association is a 'sham' and, therefore, should be disregarded.") (citations omitted); *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722, 725 (N.D. Ala.) ("two corporations can be treated as a single entity . . . only when the facts show that the separate existence of the two corporations was a sham"), *aff'd*, 664 F.2d 295 (11th Cir. 1981).

14. *See, e.g., Murray v. Miner*, 74 F.3d 402, 404-05 (2d Cir. 1996) (applying four-factor analysis where employees of defunct corporation brought suit against successor corporation's principal shareholders, expressly characterizing the analysis as a kind of veil-piercing reserved for "extraordinary circumstances"); *Marzano*, 91 F.3d at 513-14 (applying four-factor analysis to determine whether parent should be liable for discriminatory acts of subsidiary, expressly characterizing the inquiry as whether to override the presumption of limited corporate liability by piercing the corporate veil); *Brown v. Vitelcom, Inc.*, 47 F. Supp. 2d 595, 599-600 (D.V.I. 1999) (applying the four-factor analysis to determine "whether to look behind the corporate veil" and hold parent liable for discriminatory acts of subsidiary).

Congress. As the Court held in *Bestfoods*, the background common law standard applies unless Congress expressly provides otherwise. But the concern is also unfounded: "[t]here are a sufficient number of federal decisions dealing with shareholder liability that one can decipher a sort of generalized federal substantive law on disregard of corporate entity;" and since that federal law draws on state law for guidance, whether federal or state law applies presents a question of "little practical significance." *In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution*, 675 F. Supp. 22, 33 (D. Mass. 1987) (citation and internal quotation omitted). In any event, there is little difference between the veil-piercing law of each state. *See Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 841 n.17 (D. Del. 1978) (in considering whether to hold parent liable for subsidiary's obligations, court stated that certainty as to the proper choice of law was unnecessary because "general principles of corporate and agency law . . . do not vary significantly from jurisdiction to jurisdiction").

The Petitioner also protests that the Seventh Circuit's approach will deny "countless victims of discrimination" access to the courts because their claims will not be decided by the "more flexible four-factor test." Petition at 15. This suggestion that courts should disregard the corporate form, in order to manipulate the statutory minimum-employee requirements Congress has prescribed, once again flies in the face of *Bestfoods*.

3. *Need for Direct Involvement (Control of Labor Relations) by Parent.*

The Petitioner also protests that two of the Seventh Circuit's three tests "require[ ] actual evidence of direct involvement of the parent company." Petition at 10. The Seventh Circuit is hardly alone on this issue. As discussed in Section I, the NLRA cases make the parent's "actual and

active control of labor relations" the *key* criterion, and the same holds true in cases arising under the antidiscrimination statutes. Case after case holds that under the nominal "four-factor test" the parent's direct involvement in the alleged act of discrimination is the central and critical criterion:

> Courts applying this four-part standard in Title VII and related cases have focused on the second factor: centralized control of labor relations. This criterion has been further refined to the point that "[t]he critical question to be answered then is: What entity made the final decision regarding employment matters relating to the person claiming discrimination?"

Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983) (alteration in original) (citations omitted) (quoting *Odriozola*, 531 F. Supp. at 1076).[15] Indeed, the Seventh Circuit noted

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15. *See also, e.g.*, *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240-41 (2d Cir. 1995) (same); *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1090 (10th Cir. 1991) (same); *Hukill*, 1999 WL 739407, at *7 (same); *Johnson*, 814 F.2d at 981 n.* (no need to adopt four-factor test, because "the factors all point to the ultimate inquiry of parent domination"); *Lusk*, 129 F.3d at 777 ("[The four-factor] analysis ultimately focuses on the question whether the parent corporation was a final decision-maker in connection with the employment matters underlying the litigation, and all four factors are examined only as they bear on this precise issue.") (citations omitted); *Skidmore v. Precision Printing & Packaging, Inc.*, 1999 WL 710539, at *7 (5th Cir. Sept. 13, 1999) ("Traditionally . . . courts have focused almost exclusively on one question: which entity made the final decisions regarding employment matters relating to the person claiming discrimination?"); *Swallows*, 128 F.3d at 994 ("None of these factors is conclusive, and all four need not be met in every case. Nevertheless, control over labor relations is a central concern.") (citations omitted); *Armbruster*, 711 F.2d at 1337 (while four-part test provides "guidance," "control over the elements of labor relations is a central concern"); *Herman v. United Bhd. of Carpenters*

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that in many cases reciting the "four-factor test," "the focus of the opinions is on whether the parent corporation made the personnel decision — committed the discriminatory act — of which the plaintiff was complaining." App. A-4. The Seventh Circuit's restatement of that principle places it in the mainstream of the circuits, not in conflict with them.

4. *Unimportance of Common Ownership.*

To suggest that the line between Walsh and Katy should be blurred, the Petitioner relied heavily on aspects of their relationship as company and shareholder/owner: Walsh reported information upstream to its owner, and Katy provided services (like the opportunity to participate in employee benefits plans) downstream to its subsidiaries, including Walsh. The Seventh Circuit stated that the "factor" of "common ownership" was "useless." App. A-4. In this observation it was also in the mainstream of authority, both from NLRA cases and from cases under employment discrimination statutes. As discussed in Section I, the Board treats the "factor" of "common ownership" as insignificant, and employment discrimination cases follow suit:

> Common management and ownership are ordinary aspects of a parent-subsidiary relationship. . . . Courts have recognized that the mere existence of common management and

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& Joiners, 60 F.3d 1375, 1384 (9th Cir. 1995) (requiring evidence of "inter-relationship between the day-to-day operations" of the affiliates); *Frank*, 3 F.3d at 1363 ("The critical question is, '[w]hat entity made the final decisions regarding employment matters related to the person claiming discrimination?' ") (alteration in original) (quoting *Trevino*, 701 F.2d at 404); *Llampallas v. Mini-Circuits Lab., Inc.*, 163 F.3d 1236, 1244-45 (11th Cir. 1998) (four-part inquiry focuses on "the degree of control an entity has over the adverse employment decision on which the Title VII suit is based"), *cert. denied*, 1999 WL 592941 (U.S. Oct. 12, 1999).

> ownership are not sufficient to justify treating a parent corporation and its subsidiary as a single employer.

Lusk, 129 F.3d at 778. As the cases often bluntly state, "common ownership . . . , standing alone, can never be sufficient to establish parent liability." *Lockhard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1071 (10th Cir. 1998) (quoting *Frank*, 3 F.3d at 1364).[16]

Just as ownership itself carries no weight in the analysis, neither do the ordinary incidents of ownership. The Seventh Circuit noted that a small firm's taking advantage of services available within its corporate family — like pension plans, employee benefits, accounting services, group insurance — does not destroy the independence and legal autonomy of the parent and subsidiary. App. A-8-9. The Seventh Circuit's observations do not conflict with the other circuits' holdings. The courts agree, for example, that "it is not beyond the normal parent-subsidiary relationship for the parent to serve as ERISA Plan Administrator for the subsidiary, [and this does not] evidence[ ] excessive control" by the parent. *Frank*, 3 F.3d at 1363.[17]

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16. *See also, e.g., Hukill*, 1999 WL 739407, at *7 (same); *Frank*, 3 F.3d at 1364 (same); *Johnson*, 814 F.2d at 980 (" '[o]wnership of a controlling interest in a corporation entitles the controlling stockholder to exercise the normal incidents of stock ownership, such as the right to choose directors and set general policies, without forfeiting the protection of limited liability' ") (alteration in original) (quoting *Baker v. Raymond Int'l, Inc.*, 656 F.2d 173, 180 (5th Cir. 1981)).

17. *See also Marzano*, 91 F.3d at 514 (participating in parent's pension plan does not make parent the employer); *Moreno*, 963 F. Supp. at 76 (subsidiary's use of accounting services did not make parent and subsidiary a single enterprise); *Evans*, 936 F.2d at 1090 (affiliate's inspections, training, oversight did not make it employer);

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D. Conclusion.

The Seventh Circuit declined to use the label "four-factor test" in considering the claim that Walsh and Katy should be aggregated. The fact that certain other circuits have used that label does not signal a circuit split, as the Petitioner contends. Labels aside, none of the Seventh Circuit's substantive observations is unprecedented, but on the contrary each is well supported by law in other circuits. Indeed, only the position urged by the Petitioner could create a conflict — one with the Court's holding in *Bestfoods*.

Though not every circuit uses the same verbal formula to describe the inquiry regarding aggregation of affiliated companies, the circuits continue to refine and incrementally sharpen their analyses, both under the NLRA and under the antidiscrimination statutes, as they have for more than 40 years. In the absence of stark conflict there is no reason to grant review.

III. THERE IS NO UNSETTLED ISSUE OF GREAT IMPORTANCE.

Not only is there no conflict calling for review, but the issues presented here are not of such great importance as to call for review. The issues as they relate to the resolution of the Petitioner's particular case lack great importance, because the facts present here could not support relief under any formulation of the test for aggregation. Nor are there unsettled issues of great importance generally, for there is no substantive rift among the circuits, and in any event the courts have no power to grant the relief requested.

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Stanford v. Bramble USA, Inc., 1999 WL 495466, at *4 n.4, 7 (N.D. Ill. June 30, 1999) (parent's sponsorship of employee benefit plan does not make it employer); *Hukill*, 1999 WL 739407, at *6 (affiliate's providing administrative services did not make it employer) (citing *Papa*).

A. Lack of Importance to the Petitioner's Case.

As the Seventh Circuit observed, Walsh and Katy complied with all the formalities required to preserve their separate corporate identities. App. A-2. The facts urged as a basis to aggregate them are the kind of intra-corporate-family contacts (e.g., shared pension plan, insurance providers, benefit plans, reporting relationships) that are universally acknowledged to be insufficient to justify aggregation. However the statement of the test for aggregation might be refined, it would not alter the outcome here. This is not a case in which the interplay of issues would sharpen the debate and enrich the legal discourse. It is therefore unworthy of review.

B. Lack of Importance Generally.

Nor are there abstract areas of debate where the law is gravely uncertain or the courts divided. The issues of whether and under what circumstances separate corporate identities should be disregarded are not new or novel.

The only great division in the courts identified by the Petition is one of nomenclature: whether the test should be called "the four-factor test" (even though courts frequently state that one question — common ownership — answers nothing, and another — who committed the discriminatory act — is solely critical) or whether it is permissible to abandon that label for another. As discussed above, there is more debate about the name than about substance.

The Petitioner also argues that the case is important because of the "remedial" nature of the statutes at issue. That argument is a naked plea for relief: a desire to obtain by construction what Congress failed or refused to do in legislation, simply from disappointment at being just beyond the reach of the legislation as written.

The Petitioner raises the issue of legislative history, criticizing the Seventh Circuit for assertedly understating the statutes' purposes; but he does not explain how his proposed alternative view of the statutes' purpose makes a difference in answering the issue presented. In fact there is no useful legislative history to explain the small-employer exemptions in the statutes. One of the cases the Petitioner cites confirms there is no legislative history of the ADEA provision, and instead analogizes to Title VII. *Morelli v. Cedel*, 141 F.3d 39, 45 (2d Cir. 1998). Another case, construing Title VII, features a debate between the majority and dissent over the insights to be drawn from congressional floor debates (the least useful kind of history). *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314, 1322 (2d Cir. 1995). In any event, the purpose of the small-employer provision could not be (as some floor debaters suggested) to serve as a proxy for interstate commerce, because each statute's definition of "employer" separately requires an effect on interstate commerce.

The most that can be said about the small-employer exemptions is that they are protective of small employers. As the Court made clear in *Bestfoods*, the courts cannot, even for a "good" cause, override corporations' limited liability without express congressional authority. Here, Congress did not grant such authority, but on the contrary enacted legislation protective of corporations as small as Walsh. This case lacks importance generally because the kind of relief the Petitioner seeks — modification of protected corporations' limited liability, based solely on asserted remedial aims Congress did not codify — is beyond the power of the courts to grant.

CONCLUSION

The issue presented here is not worthy of review because it presents neither a split in the circuits nor an unsettled question of great importance. Indeed, the case is particularly unworthy of review, both because (given the facts) this Petitioner could not win relief for himself even under his requested formulation of the test for disregarding corporate form, and because (given any facts) no party could win the kind of relief sought here (a softening of the standards for corporate disregard) in light of the Court's decision in *Bestfoods*. The petition for writ of certiorari therefore should be denied.

Respectfully submitted,

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